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No. 930

In the Supreme Court of the United States

OCTOBER TERM, 1970

JOSEPH ARABILE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No.

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JOSEPH AMABILE,

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vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Joseph Amabile, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on October 2, 1970.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals in the original appeal of this case (reported at 395 F.2d 47) are reprinted as Appendix A, *infra*. The majority and dissenting opinions of the Court of Appeals in the related, but separate, original appeals of the co-defendants at trial (*United States v. Battaglia and Evans*, 7th Cir. 1968, 394 F.2d 304) are reprinted as Appendix B, *infra*. The majority and concurring opinions of the Court of Appeals in the consolidated appeal from the re-entry of judgment by the District Court (not yet reported) following this Court's mandate in *Giordano v. United States*, 394 U.S. 310 (1969), are reprinted as Appendix C, *infra*.

JURISDICTION

The judgment of the Court of Appeals (Appendix D, *infra*) was entered on October 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether it is a violation of the Hobbs Act (18 U.S.C. Section 1951) to extort money from a businessman whose business receives supplies shipped in interstate commerce where the threat of extortion is to injure the businessman and members of his family but does not carry with it, express or implied, a further threat to obstruct, delay or affect any aspect of the business, and the only effect claimed is the depletion of the assets of the business by reason of a subsequent payment of money?

II. Whether proof that alleged co-conspirators combined and agreed with Petitioner in a scheme to defraud is a sufficient basis from which to infer that they also agreed to commit extortion, where there is no evidence

that they knew or approved of Petitioner's unilateral act of threatening the victim and the entire scheme had previously been conducted by trickery and deceit rather than by violence or threat of violence? And whether, if the answer to the foregoing is in the negative, Petitioner could be convicted of conspiring to violate the Hobbs Act in the absence of evidence that he agreed with anyone to threaten the victim?

III. Whether refusal to allow Petitioner to inquire on cross examination of the principal Government witness if he was a defendant in a pending state court indictment for a felony, if he was being investigated for income tax evasion, and if he expected favorable treatment in these matters in consideration for his testimony, all for the purpose of showing motive, deprived Petitioner of the right of cross examination guaranteed by the Sixth Amendment? Whether Petitioner was deprived of this same Sixth Amendment right by the ruling of the trial judge prohibiting him from asking this witness to point out, in a pre-trial statement given to agents for the Government, where complaint of certain specific threats, about which the witness had testified, had been recorded after the witness had answered that the complaint was contained in the statement; and, in prohibiting him from asking the witness if he had made this complaint in four other statements given to the Government agents? Whether these same rights were violated by refusing to permit the defense to ascertain the residence of the principal Government witness?

IV. Whether Petitioner was properly denied access to the minutes of the grand jury testimony of certain key Government witnesses, and whether a new procedure, granting defendants access to such minutes as a matter of right, may be limited to prospective cases?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Sixth Amendment, Constitution of the United States, provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him. * * *"

Section 1951, Title 18, United States Code, provides:

> "*Interference with commerce by threats of violence.*
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years or both.
>
> "(b) As used in this section
>
> "(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> "(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> "(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any

point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

STATEMENT

Petitioners Joseph Amabile, Salvatore Battaglia[1] and Dave Evans[2] were indicted by the United States Grand Jury for conspiracy to violate the Hobbs Act (18 U.S.C. Section 1951). The one-count indictment charged that, beginning in or about July, 1964, the three defendants, an unindicted co-conspirator, Reece Pranno, and others unknown to the Grand Jury conspired to obstruct, delay and affect interstate commerce by extorting $48,500 from the Riley Management Corporation, a firm engaged in the construction of multiple dwelling units ("King Arthur Apartments") in Lansing, Illinois. The indictment, containing requisite allegations that "the movement in interstate commerce of materials, supplies, and other commodities required for the construction, sale, rental and management of said multiple dwelling units" was to be obstructed, delayed and affected, alleged that the conspiracy continued to the date of the return of the indictment, February 16, 1967. (1 App. 2, 19-21)[3]

Following trial by jury, the defendants were all found and adjudged guilty. Petitioner was sentenced to the custody of the Attorney General for a term of fifteen years

[1] Petitioner in No. , October Term, 1970.

[2] Petitioner in No. , October Term, 1970.

[3] "App." references are to the volume and page of the Joint Appendix for Appellants as printed for the Court of Appeals

and to pay a fine of $10,000. (1 App. 91-2) In separate opinions[1] the Court of Appeals affirmed all convictions by a two to one vote.

While Petitions for Certiorari (Numbers 106, 129 and 168, October Term, 1967) were pending, this Court entered its mandate vacating the judgments and remanding the case to the District Court for proceedings in conformity with *Alderman v. United States*, 394 U.S. 165 (1969), *Giordano v. United States*, 394 U.S. 310 (1969). Upon the hearing by the District Court, the Government advised the court that it did not have any record of overhearings of this Petitioner, or, presumably, of premises owned by him. The District Judge then reimposed judgment upon the Petitioner. Petitioner appealed to the United States Court of Appeals for the Seventh Circuit, but did not raise any issues concerning the nature of the "wiretap" hearing. The Court of Appeals reaffirmed Petitioner's conviction, one Judge concurring in part, but noting his adherence to his prior dissents.

The following facts are grouped in the same order as the corresponding reasons for granting the writ to which they are pertinent.

[1] The appeals of Battaglia and Evans were heard together and decided in an opinion filed January 9, 1968. Their Petitions for Rehearing and Suggestions that Rehearing be heard *en banc* were denied April 17, 1968. Petitioner's appeal was heard separately and decided, by the same three-judge panel, in an opinion filed April 26, 1968. No Petition for Rehearing was filed in response to this judgment. The majority opinion in each case was written by Judge Cummings and concurred in by Judge Schnackenberg. Judge Swygert wrote a dissenting opinion in each case.

I. A threat of extortion must have a reasonable causal relation to interstate commerce in order to violate the Hobbs Act.

Background of original scheme to obtain money "by fraud and deceit."[5]

During the years 1964 and 1965, William Riley was the president and principal stockholder of the Riley Management Corporation, a company engaged in construction of apartment projects. (II App. 489-90) In June 1964, Riley told defendant Evans, eventually his construction superintendent for the project, to begin lining up subcontractors for construction about to be started in Lansing, Illinois. Evans was cautioned to keep the project a secret from Petitioner and one Nick Palermo, for Riley was fearful that he would be forced to use their services if they learned of it. (II App. 502)

A few days later, Riley met with Palermo and Petitioner in the office of Palermo's Melrose Park Plumbing Company. Palermo asked for an opportunity to bid on the plumbing contract for the Lansing project. Riley demurred. Petitioner told Riley that, if he did not give them the work, he would stop other Riley projects in North lake and Westmont, Illinois, and they would put him out of business. Amabile said he knew how to handle "wise guys" and Riley "would be walking the streets with a candy cane." He also said he knew where Riley's mother lived, where his kids went to school, and they had a baseball bat to handle "wise guys" like Riley. (II App. 506-7)

Shortly thereafter Riley told Evans about the meeting with Amabile and Palermo, adding that he was disgusted and frightened that they had learned of the impending

[5] The phrase is Judge Swygert's. See, App. B, *infra* p. App. 55

Lansing project. He reiterated, however, that he could not use them and told Evans, if he were contacted by them, to pretend to give them work, but not to do so." (II App. 511-12)

Riley told Evans in June, July or August, 1964, that he had borrowed sufficient funds to begin the underground work on the Lansing project and instructed him to obtain a good sewer contractor, one who was "foreign" to Amabile and Palermo. (II App. 515) At about the same time, Amabile told one Mike DiVito and alleged co-conspirator Rocco Pramno that he and Riley had purchased some property in Lansing and they had a number of buildings under construction, for which building, sewer and water main construction, and paving was being done. DiVito inquired whether he could obtain some of the sewer and

"Eventually, however, in September or October 1964, Riley gave the Lansing plumbing contracts to Palermo because, as he testified, he was afraid of Amabile and Palermo. He explained that he feared economic ruin, that his existing projects in Northlake and Westmont, Illinois, would be stopped, and that physical harm would come to his family and employees. (II App. 508-11) The Northlake project had already been completed at this time, however. (I App. 122, 127, 249)

Palermo, although well-known to the Grand Jury at the time of the return of the instant indictment, as evidenced by the Grand Jury's simultaneous return of an indictment charging him with a similar offense against Riley, was not charged as a defendant or as a co-conspirator non-defendant in the instant case. It is not clear just what significance "giving the contract" to Palermo had for the instant case, nor is it clear what contracts were given. Riley testified he gave the contract to "Melrose Park Plumbing, Melrose Park Electric, Melrose Park Heating, Melrose Park Painting, Melrose Park et cetera, et cetera." (II App. 513) It is clear, however, that Palermo was not given the sewer contract in conjunction with which the charged extortion of $48,500 took place. See, text, pp. 9-10, *infra*.

water main work, and Amabile answered that it was possible, but, if he did, Amabile did not want DiVito's name associated with the contracts. (1 App. 120-1) At a subsequent meeting, Petitioner told Pranno and DiVito, that they could get the sewer and water main contract if they came up with a "good clean fellow" to do the work for them (1 App. 123-24)

In September 1964, Pranno and DiVito hired one Henry LaKey as president of Carlson Construction and Equipment Company, a firm to be organized for the Lansing project. (App. 125-27)

Subsequently in September, according to one version, DiVito, Evans, Pranno and Amabile met in the latter's apartment to discuss the sewer contract for the Lansing project. Pranno told Amabile they had LaKey to do the work for them. Amabile assented, but demanded $20,000 in cash before giving them the job. After looking at the plans, specifications and figures which Evans then provided, DiVito advised Pranno that they would be able to pay this amount. Thereupon Pranno told Amabile he would give him the $20,000 in cash. Afterwards, Pranno told DiVito never to say anything in front of Evans because he was Amabile's "guy" and it would get back to him. (1 App. 128-29)

According to LaKey's version, he—and not Pranno—was present at this meeting. Amabile said to DiVito: "Mike, I'm giving you this job. I want this job done right. I don't want no problems with this job and I don't want no trouble with it. I can give the job to anybody I want, but I'm giving it to you and Jimmy [Pranno]. I don't care about nothing else. I get my 20 grand off the top." (1 App. 254-56)

In September, Evans told Riley he had procured an excellent sewer contractor, Carlson Construction Company, operated by a Mr. LaKey, to do the work in Lansing. Riley inquired about LaKey's reputation and ability, and Evans assured him that the company's reputation was excellent and that it could do the job. (II App. 516)

The Carlson Construction and Equipment Company was formed in October, 1964. LaKey, the president, received a 10% interest in the corporation; DiVito and Pramno each received a 45% interest. (I App. 130-32). Thereafter the corporation was awarded the sewer and water main construction contract for approximately $1,60,000. Carlson was to install the sewers, the sewer mains, the water mains and a lift station. It was to be paid in three draws for work installed in place every 30 days upon the inspection and approval of the engineer in charge of the project and Evans. (I App. 132-33; 270).

Also in October, Pramno told DiVito and LaKey to meet with Amabile and Evans. At that meeting DiVito told Amabile that he and Pramno had concluded there was not enough in the original contract to pay out the money "off the top." DiVito said that they had to have more money or they did not want the job. (I App. 262-65). Amabile then instructed Evans to devise a way to obtain more money from the job. Evans and DiVito discussed methods of doing this, the discussion ending with Evans' tearing up the original contract calling for payments of approximately $150,000 and writing a new contract providing for payments of $199,600. (I App. 265-67)

Work began on the project in early October. (I App. 135) Fabricated steel forms and prefabricated sewerage pumping stations, manufactured in Missouri and Iowa, were delivered to the project in Lansing, Illinois. (I App.

103, 234, 236, 238, 241) No shipments of materials were delayed. Because of an urgency, shipments in one case were made quite rapidly from Cranco Steel Company, St. Louis, Missouri: "These shipments had been expedited rather than delayed." (1 App. 108) Iron pipe shipped to the construction site was installed as soon as it arrived. (1 App. 288) A lift station, shipped from Kansas, was installed three days after receipt. (1 App. 288)

Toward the end of October Evans told LaKey that he did not want him talking to certain engineers on the job because he was afraid LaKey would tell them Evans knew Amabile, and, if that got back to Riley, he, Evans, would be in trouble. (1 App. 285-86) Sometime later Evans told LaKey, in reply to the former's inquiry about the letting of contracts, that the only contracts he let at Lansing were the ones Amabile told him to. (1 App. 283-84)

A few days prior to Carlson's first draw, Amabile told LaKey to prepare the paper work. LaKey returned with the papers and told Amabile the amount of the draw was $57,000. (1 App. 289-91). Amabile said he would contact Evans and straighten it out. LaKey was told to come back the next day. (1 App. 295)

When LaKey returned, Amabile told him Evans was in the hospital. On the way to the hospital Amabile said that he was going to give Evans a $5,000 "cut" instead of $7,500. (1 App. 297) At the hospital Amabile gave Evans a "wad of bills." Then Amabile instructed Evans to go over the papers for the draw with LaKey. Evans did so, crossing off a number of items on the estimate sheet. Evans then had LaKey obtain a new estimate from the engineering firm. LaKey questioned the new figure, $47,517.97, as quite a drop from the original. Evans said

those were his instructions from the other men for whom he worked." (I App. 299-302) The draw was made on November 12, 1964.

Lakey received the check for the draw and, from its proceeds, deposited $39,000 in Carlson's account at the Colonial Bank, gave Evans $8,000 in cash and returned $61 for his wages. (I App. 304-5) Three days later, on Amabile's instructions, he withdrew $20,000 from Carlson's account and gave it to him in cash. (I App. 305-7) When DiVito asked Lakey, a few days later, about paying bills with the proceeds of the draw, Lakey told him not to worry, he was paying them. Then he added that Amabile wanted $10,000 from the draw and he had given it to him. (I App. 141-45)

Shortly after the draw Lakey asked Evans how they were able to charge so much for various materials and installations without anyone's becoming suspicious. Evans answered that he was in Riley's office to take care of these matters and for Lakey to mind his own business. At that point Amabile walked up, and, upon being told by Evans that Lakey was getting too nosey, told Lakey to mind his own business, that Evans worked for him, he had put Evans in that office. (I App. 308-9)

After Carlson had received the first draw Riley told Evans that he had been advised of complaints from supply contractors that Carlson was not paying its bills. Evans replied that he could not understand the problem, he was happy with Carlson, and he would take care of the matter. (II App. 523-25) Shortly thereafter, Riley repeated this complaint to Evans, telling him that the lending institution, by whom the pay outs were made, had received complaints from the suppliers. Again, Evans promised to look into the matter. (II App. 527)

In January 1965, LaKey told Evans that Carlson did not have sufficient funds to pay for necessary work and materials. Evans said not to worry, he would talk to Amabile and Amabile will talk to "the man" and they would see that the money was in the bank for him. (4 App. 327)

Events precipitating threat of extortion

In January 1965, Amabile told LaKey to prepare the papers for the second draw. LaKey prepared a request for $60,000 and brought the papers to Amabile. Amabile said he had told LaKey never to draw over $48,000, he did not want that kind of money taken out of the account at that time. He told LaKey to leave the papers with him and he would have Evans straighten the matter out. That night LaKey received a telephone call from Evans who said that Amabile had told him to check with LaKey about the draw. (11 App. 343-44) Later, Evans went to LaKey's home and they went over the papers. Evans arrived at a figure of $48,000. He then approved the draw and told LaKey to take it to the comptroller for a pay out slip. (11 App. 344-45)

The comptroller refused to authorize the pay out. From his office LaKey went to Amabile, relating, in Evans' presence, what had happened. Amabile said they would have to take care of that and instructed Evans and LaKey to see Riley the next day. (11 App. 346)

Evans and LaKey went to the office together, although at Evans' request they entered separately. When LaKey told Riley that he was there for the pay out slip for the second draw, Riley replied that Carlson's bills had not been paid and he would authorize the pay out only after they were. LaKey said he could not pay them until he received the draw, explaining that, as the contract had been increased to $200,000, there were not enough funds in the

bank to pay all of the draws. When Riley asked Evans to explain why the contract had been increased, Evans said they had raised the price to get the job done because of complications. (II App. 349-50; 530)

LaKey returned to Amabile and reported that Riley had refused to authorize the second draw. Amabile told LaKey to meet him the next morning and he would go with him to get the matter "straightened out once and for all." (II App. 351)

The threat.

Amabile and LaKey went to Riley's office the next morning. Amabile asked Riley why he would not pay LaKey. Riley answered that he could not pay him until LaKey paid his suppliers, that the suppliers had threatened to encumber the project with liens. Amabile replied: "I don't care nothing about that. The man's got his money coming, Bill, I want you to pay his money." At that point, Amabile and Riley went into the far corner of the office where LaKey could not hear the conversation, but could see Amabile moving his arms and doing most of the talking. (II App. 352)

Riley testified to the following version of the meeting:

> "Mr. Shime [Amabile] told me that I had to pay this man, that this man was a friend of theirs; that I was expected to pay them; that if I didn't pay them all sorts of people would get mad.
>
> "I told Joe that it would be foolish for me to make this payment; that they were just pushing this company to ruination; that it just was absolutely ridiculous to pay this man and that I did not want to pay him. (II App. 533-34)

* * *

"[After we left LaKey] Mr. Shine [Amabile] told me that I had no choice on this matter; that I had to pay this man; that the man wanted him paid.

"I told him that this was silly. I had a big loan pending with Equitable Life and this thing would, it could destroy everything that we were trying to build up. I told him that, in fact I begged him not to have to pay him. He told me that I had to pay him. (II App. 534)

• • •

"He told me the man said I had to pay him and he told me if I didn't pay him there would be all sorts of trouble, and there was no sense in me making this trouble for myself so I better pay him because he was a friend of theirs." (II App. 535)

Amabile then returned to the portion of the office where LaKey was standing, smiled and winked at LaKey, and told him he would receive his money. Then he turned to Riley and said: "Don't forget, Bill, I want you to pay this man. I want you to pay him now. You know what I mean." (II App. 353) After they left, LaKey asked Amabile how he was able to tell "a big man like Riley" what to do and what not to do. Amabile gestured with his fist and replied: I got this son of a bitch right here. • • • He's afraid of me." (II App. 354)

Two days later, LaKey received the $48,512.48 pay-out. (II App. 354-55) He deposited the check in Carlson's account at the Mount Prospect Bank (II App. 356) which Amabile had instructed him to open for the prospective second draw in October 1964. (I App. 327-29) Later, at Amabile's direction, LaKey withdrew $17,000 in cash which he brought to Amabile's apartment. From the $17,000

Amabile gave LaKey $6,000, LaKey in turn gave Evans $1,000." (II App. 360-61)

Riley authorized this second draw, as he testified, because he was afraid of Amabile, he had been subjected to previous threats of physical harm to himself, his family and employees, and with economic harm to his company." (II App. 536, 538, 666)

In response to Petitioner's contention that this evidence did not demonstrate a violation of the Hobbs Act, the majority below held: (1) "Since Congress has used all its 'broad and sweeping' commerce power in enacting the Hobbs Act, the courts have rightly attributed great scope to the statute." (2) "As in [*Hulahan v. United States*, 8th Cir. 1954, 214 F.2d 141, *cert. den.*, 348 U.S. 836], Amabile was exacting tribute from a builder 'dependent upon interstate commerce for materials, equipment and supplies' and was therefore within the reach of the Hobbs Act." (3) "As pointed out in our prior opinion [*United States v. Battaglia*, 7th Cir. 1968, 394 F.2d 304], the $48,000 payment made pursuant to Amabile's threats depleted Riley Management Corporation's reserves. Depletion is pertinent in considering commerce under the Hobbs Act." (4) "The Hobbs Act does not require that the threats to Riley and his family be directly aimed at interstate commerce. * * * There is no requirement that the extortion be directed at interstate commerce as long as the extortion 'in any way or degree obstructs, delays, or affects commerce' * * *." (App. A, *infra*, App. 2-4)

The dissenting Judge, on the other hand, concluded: (1) "There was no evidence * * * that there was any delay

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[1] At the same time, Amabile instructed LaKey not to tell Pramco [illegible] about the money or the new bank account. (II App. 360)

[2] See Statement Point III, *infra*, pp. 28-29 n. 11.

on the shipment or delivery of [materials obtained from suppliers located without Illinois]. Moreover, there was no evidence that any extortion threat directed against Riley carried with it, express or implied, a threat that the work on the Lansing project would be stopped or hindered." 2) "* * * [a] threat to extort proscribed by the Hobbs Act must have a reasonable causal relation to interstate commerce. The likelihood of an obstruction to the flow of commerce must be the result of the threat. This essential nexus is missing in the instant case." 3) "In the instant case * * * there was no * * * probability that Amabile's threats to Riley, if not complied with, would have resulted in the interruption of the shipment of construction supplies and materials for the Lansing project. (In fact, it was to Amabile's advantage that the Lansing project proceed without interruption; for only then would Riley have authorized Carlson Construction Company to request 'draws' for funds * * * *)" 4) "If a depletion of reserves is all that is necessary to show the requisite effect on commerce, then a threat of any kind to extract money made to a person who happens to operate a business engaged in interstate commerce comes within the statute's proscription. * * * I do not believe that the Hobbs Act was intended to have such a broad reach." (App. A, *infra* App. 13-16)

II. There was no proof that Petitioner conspired to extort money from Riley or the Riley Management Company.

The activities of the co-defendant Dave Evans in those matters leading to the payment of the $48,500 second draw have been detailed in Point I of the Statement, *supra*. After receiving the $5,000 from Amabile, LaKey, at Amabile's request, went to Florida. Shortly thereafter, Evans called and advised LaKey that Amabile wanted him to return to Chicago. LaKey returned and met with Evans and Ama-

bile. Amabile complained that, by not paying bills, LaKey had gotten him in trouble with Riley, had gotten Riley in trouble, and was "making Dave Evans lose his job." (II App. 361-63) A few days later, LaKey complained to Evans that the bills were unpaid because of Amabile's actions. Evans agreed but advised LaKey to follow orders. LaKey asked Evans why he did not get out of the business and Evans replied that he could not quit as he was in too deep, he knew too much about the other people and he owed Amabile too much money. (II App. 363-64)

Pranno's activities have also been described, although in less detail.

Evidence concerning Rocco Pranno.

Within a week or ten days after work on the Lansing job began, Amabile told DiVito, who had been assisting LaKey at the construction site, to stay off the job and that he would have trouble if he did not stay away. DiVito relayed this to Pranno and then returned to the site. (I App. 140-43) Amabile repeated his warning to DiVito later in October. Again DiVito relayed the matter to Pranno who instructed DiVito to return to the job, telling him he would accompany him there. Pranno did this for a few days. Later, however, Amabile warned DiVito a third time, telling LaKey, in DiVito's and Evans' presence: "I thought I told you to keep Mike DiVito off the job. We don't want him on the job. He is too well known. We don't want Riley people seeing him on the job and he might get Dave Evans in trouble. He will get my mon in trouble, Dave Evans, at the Riley office." DiVito did not return to the job site after this. (I App. 143; 279-81)

At about this time, Pranno complained to DiVito that LaKey was not reporting to him on the progress of the job. LaKey joined them a few minutes later and Pran-

no complained that LaKey was too friendly with Amabile. (I App. 149-50). A similar scene between Pramno and LaKey took place in late December. Pramno raised a chair as if to hit LaKey and yelled at him, saying: "What are you always doing by Joe Shine's [Amabile's] place? Are you his partner?" LaKey denied this, and at that time Amabile walked in. Pramno repeated he did not want LaKey going to Amabile's night club. (I App. 151-54)

After LaKey deposited the proceeds of the second draw in the account at the Mount Prospect Bank Amabile instructed him not to tell DiVito or Pramno about the new bank account or the money. This conversation took place immediately prior to the distribution of $17,000 from that draw. (II App. 360-61; see Statement Point I, *supra*, pp. 15-16.)

In mid October 1964, Pramno had given DiVito and LaKey approximately $13,000 to open a bank account for Carlson at the Colonial Trust & Savings Bank. (I App. 135-37; 273-75) Sometime later, but prior to the first draw, DiVito, LaKey and Pramno borrowed an additional $5,000 for operating expenses which LaKey was to deposit in the Carlson account. (I App. 146) This $5,000 was due to be repaid on January 5, 1965. On or about that date, both Pramno and DiVito met with Amabile, complained that they could not find LaKey and asked Amabile to help them get the $5,000 back from LaKey. (I App. 154-55; 158-59) Several days later, they again met with Amabile, and Pramno said that, if Amabile could not help locate LaKey, he was going to the "Farm to see the 'man.'" Amabile said to go ahead. (I App. 161) As they left, Pramno told DiVito he did not understand why "The Man" took Northlake away from him and gave control of it to Amabile (I App. 161-63) when he was doing so well there. (I App. 166-67)

Evidence concerning Sam Battaglia

In November or December 1964, prior to the above conversation, Amabile took LaKey to a farm owned and operated by Battaglia. LaKey was introduced to Battaglia as the man who was "running the job for them in Lansing, Illinois." (1 App. 329-30) As Battaglia and Amabile returned from a private conversation, Battaglia asked why Evans was receiving "that kind" of money. Amabile answered: "I made a deal with the man. The man got us the job. * * * I promised him $7,500, I'll take care of it." (1 App. 332-33) While they were driving back, Amabile asked LaKey if he knew who they had just seen and, receiving LaKey's answer that he did not, said it was none of LaKey's business, that he would find out later. (1 App. 333-34) LaKey did some work at the farm the following Sunday. When he returned, he asked Amabile why he had not been told that the farm belonged to Battaglia. Amabile told him to forget he had been to the farm. (1 App. 337-38) The following day, LaKey told Evans of his trip to the farm. Evans said not to talk about that and not to let Amabile hear him talking about it. (1 App. 339-40)

Pranno and DiVito drove out to the "Farm to see 'The Man'" about LaKey in late February or early March 1965. They met Amabile there. After a short wait, Battaglia arrived. In response to an inquiry by Battaglia as to what he could do for them, Pranno said: "You know about this Riley deal in Lansing where we got Hank LaKey to set up the company and do the work for us and figure $20,000 in for you." Battaglia "nodded." Pranno said: "Joe Shine [Amabile] got us the job and then took Hank LaKey away from us." Amabile denied this. Pranno repeated that he did, and Battaglia told the two to "cut it out." Pranno then continued: "You know we had to borrow $5,000 to keep this job in Lansing going and now I

can't find LaKey, and you know there was $20,000 in this deal for you." Battaglia nodded and said "Yes." Then D'Ambra said: "I want to know what Joe Shine is doing to me. I want you to tell Joe Shine to get that $5,000 from LaKey so that we can pay back this loan." D'Ambra also said LaKey was a "No good nobe." Battaglia replied that he did not think LaKey was "such a bad guy," that he liked him and liked to work with him, and that they had other things coming up on which they could use him again because he was "clean." After a pause of a few minutes, Battaglia told D'Ambra that he would see what he could do for him, and DiVito and D'Ambra then left. (1 App. 171-72)

The majority ruled[9] there was evidence to show that the extortion was pursuant to a conspiracy of which Evans was a member because: 1) "On this record, it is obvious that Evans knew of Riley's fear of Annabile." 2) "Evans knew that Riley was unwilling to pay the second draw * * *." 3) "The jury could properly infer that Evans knew Annabile would induce Riley through fear to authorize the second draw." 4) "Even though he may not have spoken to Annabile about the second draw, Evans' own statement to LaKey showed his willingness to take part in a course of action which would show payment by coercion." 5) "It would be unreasonable to suppose that Evans would be so closely associated with Annabile in the scheme to defraud without realizing that Annabile would employ coercive means for obtaining the second draw." 6) "* * * Evans is chargeable with his co-conspirator's acts in furtherance of the conspiracy." (App. B, *infra*, pp. App. 30-31)

Judge Swygert concluded: "The evidence with regard to Evans shows that the only agreement or 'common design

[9] *United States v. Battaglia, et al.*, 7th Cir. 1968, 394 F.2d 304. See App. B, *infra*.

and undertaking' to which he was a party was one to bilk the Riley company by means of fraud and deceit out of money earmarked for the Lansing job." (App. B, *infra*, p. App. 54)

As to Battaglia, the majority found that from the evidence of Battaglia's statement during the February or March 1965 meeting (subsequent to the second draw), to the effect that he liked LaKey and they could use him in other matters because he was clean, "* * * the jury could infer that Battaglia had embarked 'on a criminal venture of indefinite outline' * * * He was committed to a long term relationship contemplating the use of LaKey in numerous ventures. * * * Since Battaglia [admitted he] had a stake in the outcome of the conspiracy, even the stringent test of conspiracy liability evolved * * * in *United States v. Falcone*, 109 F.2d 579, 581 (2nd Cir. 1940), affirmed, 311 U.S. 205, was satisfied. * * * Being an associate of Amabile in this venture Battaglia is properly chargeable with knowledge that his confederate, Amabile, would resort to threats if necessary to extract money from Riley. Battaglia had to 'take his chances' as to the methods used by the other co-conspirators. * * * Evidence of knowledge of the details of the plan or of participation of others is not required." (App. B, *infra*, p. App. 32)

Contrariwise, Judge Swygert felt: "The slender reed on which the Government depends to demonstrate an agreement to extort between Amabile and Evans is not even present with respect to Battaglia." He concluded: "On this record there is absent any evidence, direct or circumstantial, demonstrating that Battaglia knew that money was to be extorted from Riley or that threats were to be made to Riley by Amabile." (App. B, *infra*, pp. App. 58, 59)

In Petitioner's appeal, the majority rejected his contention that the evidence failed to establish a conspiracy with a reference to its prior decision in *Battaglia*. (App. A, *infra*, p. App. 2) Judge Swygert repeated his view that "* * * there was insufficient evidence of a conspiracy engaged in by Annabile with Battaglia and Evans 'to obstruct, delay and affect commerce' * * * by means of extortion." (App. A, *infra*, p. App. 13)

III. Refusal to permit Petitioner to inquire on cross examination a) into facts showing motive of William Riley for testifying and the consideration he received therefor, b) regarding his failure to mention previous threats of physical violence by Petitioner and another in prior statements given to Government Agents, and c) as to Riley's residence, deprived Petitioner of the right of cross examination guaranteed by the Sixth Amendment.

A. During cross examination of William Riley, counsel for Petitioner attempted to show that Riley was under indictment in the Circuit Court of Cook County, Illinois, for theft,[10] that he was under investigation by the Internal Revenue Service for suspected income tax evasion, and that his testimony in this case was given in the hope and expectation of securing favorable consideration in both those matters from the law enforcement officers involved. The following took place (II App. 615-18):

* * *

Q. Are you the same William G. Riley who was indicted by the Criminal Court of Cook County for thievery in 1966 in the month of February.

Mr. Lamendella: I will object to that, your Honor.

[10] Illinois Revised Statutes, 1967, Ch. 38, §16-1, incorporates all offenses involving the taking of the property of another, by whatever means may have been recognized previously (except "robbery" and "false pretenses"), into one statutory offense, "Theft."

The Court: I will sustain the objection. Mr. Bellows, you know better than that.

Mr. Bellows: I will connect it up, your Honor.

The Court: Mr. Bellows, you know better than that and I direct the jury to disregard that question.

* * *

Mr. Bellows: May I have a side bar conference, your Honor, with reference to this?

The Court: No, no side bar conference after those questions, sir.

Mr. Bellows: May I be permitted to make an offer of proof outside of the presence of the jury?

The Court: In respect to that last question, you may.

* * *

Mr. Bellows: Your Honor, my offer of proof is as follows: I expect to show by cross examination and it may be verified, if you choose to do so, if he denies the fact, that he was indicted in the month of February, 1966, for the crime of theft which is a felony; that the matter has been pending now over a year and that the reason for the extraordinary delay in bringing this matter to justice for a crime of theft - actually it was forgery, but under our new statute, your Honor, it is considered to be theft - is that he expects to get consideration, your Honor, from the court and the prosecution in Cook County for his cooperation with the government in this case and for his testimony in this case.

For that reason, your Honor, I think it is extremely important to show motive and reason for his testimony in this case.

The Court: What is the government's position in respect to the offer of proof of the defendant Annabile?

* * *

Mr. Lamendella: If this offer is being made, your Honor, to impeach the witness on the basis of an indictment, we object.

The Court: Do you object to the offer?

Mr. Lamendella: Yes, we do.

The Court: I sustain the objection.

Bring in the jury.

Mr. Bellows: May I add one more point, your Honor?

The Court: I have ruled on your offer. You can't add to an offer once it is made, sir.

Mr. Bellows: I want to explain the position of Lamendella to be inconsistent with my offer. He says he objects to the indictment. This is beyond the indictment.

The Court: He said he objected to the offer.

Mr. Bellows: Well, he said to the indictment.

The Court: You object to the offer of proof?

Mr. Lamendella: I do your Honor.

• • •

[By Mr. Bellows]

Q. Mr. Riley, are you presently under investigation by the Internal Revenue for evasion of taxes?

Mr. Lamendella: I will object to that, your Honor.

The Court: I sustain the objection.

Mr. Bellows: May I make another offer of proof?

The Court: Yes.

• • •

Mr. Bellows: My offer of proof, your Honor, is that Mr. Riley, the witness on the stand, is presently under investigation by the Internal Revenue; that he has two lawyers prominent in the tax field in criminal cases representing him, and that if he were cross examined, your Honor, he would admit, I am sure, that he knows that his financial affairs are under investiga-

tion by the Internal Revenue for failure to account for taxes and for the evasion of taxes, and that his books are in the hands of the Internal Revenue agents, and that he expects to get consideration, your Honor, from the government for his cooperation with them in this case and for his testimony in this case.

The Court: What is the position of the government in respect to the offer of proof of the defendant Amabile?

Mr. Lamendella: We object, your Honor.

The Court: I sustain the objection.

* * *

The majority held: 1) "Viewed in isolation, Amabile's efforts to explore Riley's motives for testifying in the Government's favor might be proper." 2) "* * * [A] defendant may normally show that a prosecution witness expects favorable treatment from the Government in return for his testimony." 3) "* * * [A] witness may not be impeached by showing that he has been arrested and indicted." 4) "In the present case, the District Judge was faced with a collision of these two principles. He was entitled to balance the conflicting interests * * *" 5) Examination of Petitioner's entire cross-examination of Riley leads to the conclusion "that Amabile's references to the state indictment and federal tax investigation were designed to prejudice the jury against Riley through smear and innuendo rather than to impugn his veracity." And, alternatively, 6) "* * * that appellant's 'questions do not appear sufficiently likely to have developed evidence that would have significantly weakened the Government's case' by showing the witness' bias * * * [because] The United States Attorney does not control investigations being conducted by the Internal Revenue Service * * * [and] As to the state court criminal action, the United States Attorney was of course not empowered to accord any consideration." (App. A, *infra*, pp. App. 6-9)

Judge Swygert considered this restriction of cross-examination "an error which alone would require reversal * * * *" He did "not believe that a conflict between * * * evidentiary rules, such as the one the majority attempts to erect, exists." And, he concluded: "It is apparent from the record that the district judge perceived no 'collision' of the kind suggested by the majority. Moreover, any attempt to show the bias of a witness by evidence that he is under indictment or investigation would create the same 'collision.' Thus the rule enunciated by the majority might preclude cross examination of this kind in every case, a result contrary to the general rule permitting such inquiry." (App. A, *infra*, pp. App. 16, 19, 21)

B. The Government's claim that the $48,500 second draw was obtained by extortion rested upon Riley's assertion that he was afraid of Amabile because of threats which Amabile and Palermo had previously made concerning his personal safety and that of his family.[11] On cross examination, the defense attempted to show that Riley had not mentioned certain specific threats to which he had testified

[11] Including the threat described at page 7, *supra*, Riley told of four alleged threats by Amabile (or Amabile and Palermo) prior to January 1965. The first of these took place in April 1962, at Palermo's office. Palermo asked Riley about a proposed project in Northlake, Illinois, and Amabile told Riley he was "the man" in Northlake, Riley was not going to make a move there without his permission, and that would cost $70,000. At one of a number of subsequent meetings, when Riley said he did not have the $70,000, Palermo said he had the ability to stop one of Riley's projects in Addison, Illinois, and Amabile added there were ways people like Riley could be stopped. Subsequently, Riley paid Amabile $30,000 (II App. 540-41; 555; 557)

In June 1963, Amabile allegedly told Riley that he wanted the concession to install washers and dryers in Riley-built apartment buildings in Northlake. When Riley said he had given the concession to someone else, Amabile said "the man" wanted the business and he did not care what was done, "the man" had to have the business. (II App. 559)

that Amabile said he knew where Riley's mother lived (II App. 886 7, 865), that he said he knew where Riley's children went to school (II App. 886 7, 865), that he threatened to use a baseball bat on Riley (II App. 886 7, 864), and that Riley would need a cane from then on if Palermo did not receive certain plumbing contracts (II App. 886) in statements which he had given Government Agents prior to trial. (III App. 683 85) Riley, in answer to an invitation to point out where, in one of his statements, he had told about these threats, answered that the disclosure was recorded on the second page of his October 5, 1965 statement,

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(Footnote 11 continued)

In September 1963, at a meeting with Palermo, Amabile allegedly told Riley to give Palermo the plumbing contract on a project in Westmont, Illinois, and in any other work they asked for; he added that otherwise he could put village officials in Northlake to work to stop construction there immediately. Riley objected to Palermo's work. Amabile then told Riley he was "nothing but a wise guy and he would handle [him] with a baseball bat if [he] didn't stop trying to be a wise guy." Riley asked to leave and Amabile said he could not. Palermo said he would "bury" Riley's construction superintendent and Amabile said he would hammer the nails in the coffin. Amabile said he knew where Riley's mother lived and where his children went to school, and that Riley would need a "candy cane from then on out" if they did not receive the work. (II App. 863 65)

Evidence of these pre-conspiracy threats were received, ostensibly, to show the reasonableness of Riley's fear of Amabile in January 1965. Finding such relevance and that the "District Court carefully instructed the jury that this testimony was limited to that purpose (Tr. 2564)," the majority held Battaglia's assigned error (adopted by Petitioner) concerning the admission of this evidence without merit. (App. B, *infra* p. App. 37) Judge Swygert was "at a loss to find the 'careful instruction' referred to by the majority" and was of the opinion that the evidence of threats by Palermo, not even charged as an unindicted co-conspirator, was irrelevant for any purpose. (App. B, *infra*, p. App. 63) In Petitioner's appeal, he concluded that the admission of this evidence prejudiced Petitioner. (App. A, *infra*, p. App. 21)

the first statement he had given. (III App. 684-85) Counsel for Petitioner was then refused in four attempts to find out exactly where, on the second page, this disclosure was to be found. (III App. 684-85) Finally, he attempted and formally offered to show that Riley failed to mention these specific threats in all five of his pre-trial statements, including the one made on October 5th. The court refused to allow questions concerning this to be asked. (III App. 686-87)

C. During Riley's cross-examination by the attorney for one of the co-defendants, the following took place:

> By Mr. Walsh:
>
> Q. Where do you live now, Mr. Riley
>
> Mr. Lamendella: I will object, your Honor and ask to be heard out of the presence of the jury.
>
> The Court: Without a hearing, I will sustain the objection. (III App. 723)

IV. Refusal to order production of the Grand Jury minutes of the testimony of Government witnesses Riley, LaKey and DiVito and the subsequent adoption of a prospective rule regarding the production of such minutes by the Court of Appeals deprived Petitioner of fundamental rights.

Following the direct testimony of the witness Mike DiVito and after it had been ascertained that he had also testified before the Grand Jury, counsel moved for the production of the transcribed minutes of that testimony. (I App. 194-95) The trial judge inquired if the Government were willing to deliver up the minutes. The Assistant United States Attorney answered: "No, your Honor. We would gladly give the Court the copy for an in camera inspection." The court, ignoring this offer, immediately asked counsel "What authority do you have * * * that would make it legal for me to compel the government to turn over a transcript of this witness' testimony before the grand jury?" (I App. 195) Counsel promised to return following the noon recess with authority.

During the afternoon session the following took place (1 App. 233-34):

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The Court: All right.

Now, Mr. Bellows, I sustained an objection to your motion that the government be required to produce for the examination of the defense lawyers the transcript of the testimony of this witness before the grand jury, and I am going to adhere to that ruling. I will save you all of the research that you were going to do during the luncheon recess. I call your attention to Rule 16 as amended of the Criminal Rules and it does provide, Mr. Bellows, that the recorded testimony of a defendant before a grand jury may be produced by way of discovery and inspection. Moreover, in my opinion a transcript of a witness' testimony before a grand jury is not a statement within the meaning of Subsection (e) of Section 3500.

Mr. Walsh: Your Honor, may I join in Mr. Bellows' motion for the production of the grand jury minutes on behalf of Mr. Battaglia and I would urge as authority Dennis v. United States at the last term of the Supreme Court.

The Court: I will stand on my ruling. You may join and I deny your motion.

Mr. Bellows: Your Honor, may I ask that the grand jury testimony be sealed and impounded, your Honor, for whatever purposes we may need it?

The Court: I haven't any authority to do that. You may ask.

Mr. Bellows: I am asking.

The Court: And I deny your request.

Mr. Walsh: Can it be marked as an exhibit?

The Court: No, because I rule it is not properly here, if it were here, or if it is here.

• • •

Subsequently, following the testimony of LaKey (II App. 389-90) and Riley (III App. 688-89) the defense moved for the production of the grand jury minutes pertaining to each. The motions were denied.

Later events[12] disclosed that the minutes of Riley's testimony before the Grand Jury, like his 3500 statements, did not contain references to the alleged threats of physical violence by Amabile and Palermo.

The majority held that Petitioner "did not show particularized need [for the minutes at the time of the request] and cannot now supply that requirement by hindsight." Further, the majority said: The offer by "the Assistant United States Attorney * * * to give a copy to the Court for an *in camera* inspection * * * was not accepted by defense counsel. If it had been accepted, the statements might have been turned over to them, so that any error in this connection was of defendant's own making." Finally, the Court ruled: "In *United States* v. *Youngblood*, 379 F.2d 365, 370 (2d Cir. 1967), the Court of Appeals for the Second Circuit promulgated a prospective rule giving the defense access as of right to a witness' grand jury testimony on the subject about which he testified at the trial, unless the Government can show that access should be denied. At the oral argument of this appeal, the Government stated that it had no objection to such a prospective rule in this Circuit. We approve of the *Youngblood* procedure and adopt it with respect to trials commencing after this judgment is entered." (App. A, *infra*, pp. App. 11-12)

[12] During a subsequent trial of Amabile, Palermo and others, in which Riley again appeared as the principal Government witness, the same trial court, upon the authority of *Dennis* v. *United States*, 384 U.S. 855, ordered production of the grand jury minutes. These minutes — the same as those sought in the instant case — were certified to the Court of Appeals and were appended to Battaglia's petition for rehearing of his appeal. (See, App. A, *infra*, p. App. 10, n. 7)

REASONS FOR GRANTING THE WRIT

I. A threat of extortion must have a reasonable causal relation to interstate commerce in order to violate the Hobbs Act.

When this Court last reviewed a Hobbs Act prosecution, it declared that the Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. United States*, 361 U.S. 212, 215. Nevertheless the Court cautioned, "The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference." (361 U.S. at 218) The present case tests the limits of the Hobbs Act and the manner in which commerce must be affected to meet that jurisdictional test, and the intent of the statute. Practically speaking, the question here is whether every extortionate threat made to any person who operates a business engaged to the slightest extent in interstate commerce comes within the ambit of the statute, or whether there must be a nexus between the threat itself and interstate commerce.[1]

[1] Judge Swygert, dissenting, felt "that a threat to extort proscribed by the Hobbs Act must have a reasonable causal relation to interstate commerce. The likelihood of an obstruction to the flow of commerce must be the result of the threat." (App. A, *infra*, p. App. 14) Consequently, he viewed the majority's decision that "a depletion of reserves is all that is necessary to show the requisite affect on commerce," as having the potential of affording "a retail store owner, for example, * * * federal protection from extortion, regardless of the nature or the likely affect of the threat, simply because his stock of merchandise had in some measure moved in interstate commerce." He did not "believe that the Hobbs Act was intended to have such a broad reach." (App. A, *infra*, pp. App. 15-16) While

In the most recent Seventh Circuit decision involving the Hobbs Act preceding this case, *United States* v. *Pranno*, 7th Cir. 1967, 385 F.2d 387, *cert. den.*, 88 S.Ct. 1028, the Court said (385 F.2d at 389):

> "Extortion by threat to disrupt a local activity the stoppage of which would in turn result in stoppage of interstate shipment of raw materials essential for that activity falls within the act. The statute seems to be read as not only prohibiting the obstruction of commerce by extortion, but also prohibiting extortion by any threat, the carrying out of which would obstruct commerce."

With that statement there is no dispute. But the carrying out of the threat in the present case would not have obstructed commerce; Riley might have been injured physically, but the business of Riley Management would have continued. There was no nexus between the threat and commerce.

As a consequence, because it undoubtedly realized this at trial, the Government urged that "the resources of the Riley Management Corporation were depleted by extortion

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this is precisely the point Petitioner attempted to make below, and the outlook which prompts the question here, the example posed by Judge Swygert does not go far enough. Under the rationale employed by the majority *viz.* depletion of assets having an affect on purchasing power — extortion of anyone who purchases any of the million and one necessities of daily living which originate from without the state would be in violation of the act because a subsequent reaction to the threat — the payment of money — would deplete the victim's assets and reduce his purchasing power. And then too, because the Act also proscribes affecting commerce by robbery, the decision may be taken as opening the way for federal prosecution of the "hold-up" man merely because by his robbery he has reduced the purchasing power of his victim. This reasoning may reduce the problem to it most absurd terms, but on the other hand the decision of the majority does open wide this possibility of greatly expanded federal prosecution of essentially local crimes.

* * * [and since] the business of the Riley Management Corporation depended on shipments of materials and supplies in commerce, * * * [it could be] infer[red] that the extortion in some way or degree did obstruct, delay or affect commerce." The trial judge accepted this view and instructed the jury accordingly. (411 App. 972-73) On appeal, the Seventh Circuit abandoned the limit set by *Peanno*, accepted the Government's view, and found authority for so doing in *United States* v. *Provenzano*, 3rd Cir. 1964, 334 F.2d 678, *cert. den.*, 379 U.S. 947, in which the Third Circuit approved an instruction that the depletion or diminution of the resources of a business by "payments of money obtained by extortion [was likely to impair] the capacity to efficiently conduct such business * * * to the extent of the drain on its resources * * *" (334 F.2d at 692).

Provenzano, like most other Hobbs Act cases,[2] however, concerned a threat to delay, obstruct or affect the victim's interstate (trucking) business by labor slow downs and similar disruptive acts if the extortionate demands were

[2] See e.g., *Nick* v. *United States*, 8th Cir. 1941, 122 F.2d 660 (implied threat to disrupt victims' businesses by causing work stoppages if demands not met), *Hulahan* v. *United States*, 8th Cir. 1954, 214 F.2d 441 (freedom from labor problems guaranteed in return for payments, but intimation that same would not be true if demands not met), *United States* v. *Varlack*, 2nd Cir. 1955, 225 F.2d 695 (express threat to disrupt business if demands for payment of money not met). Compare, *Stirone* v. *United States*, 361 U.S. 212, 215 (charged threat to interfere with shipment of sand to victim, if demands for payment of money not met, within scope of the Act; whether "obstruction" of prospective steel shipments from steel mills being constructed with concrete supplied by victim would be enough, alone, to bring this transaction under the Act is a more difficult question," not decided because of other error.)

not met. 334 F.2d at 681-82, 687.) But again, this was not so in the present case. As even the majority recognized (See, App. A, *infra*, pp. App. 3-4), Petitioner did not threaten to disrupt Riley's business. Moreover, insofar as that business was a principal source of income for him,[4] it was contrary to Petitioner's interests to disrupt the business. There was no connection between the threat and interstate commerce. It was only Riley's response to the threat, his payment of money, which can be said to have had an effect on commerce, and that by reason of the fact that the payment depleted his assets. Such a tenuous relation is indistinguishable from the effect on commerce generated by the robbery of the corner drug store which also purchases its wares in interstate commerce.

One other Circuit has considered an aspect of this issue. In *United States* v. *Critchley*, 3rd Cir. 1965, 353 F.2d 358, a union business agent was charged with obstructing, etc., interstate commerce by extorting from the Associated Roofing Contractors of New Jersey a payment of $4,000, "induced by the wrongful use of economic and financial injury to the businesses of the members" of that organization and by threatened labor disputes, work stoppages and other interruptions in connection with their business operations. (353 F.2d at 360-61.) The Government failed to prove that the defendant had threatened labor disputes,

[4] Under its contract with Riley Management, Carlson was entitled to a third draw upon completion of its work. (I App. 270.) Consequently, there was evidence that, even after the second draw Amabile attempted to maintain Evans' status with Riley Management in order to insure continued performance of the contract. Thus, he recalled LaKey from Florida and complained to him that his failure to pay Carlson's bills had gotten Amabile in trouble with Riley, had gotten Riley in trouble, and was jeopardizing Evans' position with Riley. (II App. 361-63.)

work stoppages and other interruptions. It did prove that the defendant had solicited a bribe, first not to make, and then to withdraw, a complaint against one of the representatives of the association concerning his failure to meet certain contract specifications in connection with the construction of public housing. The defendant also threatened that "if he did not get the money then one by one, dead, he would ruin the roofers." (353 F.2d at 359) The Third Circuit examined the element considered important here depletion of assets. It observed that this Court has held "there are two essential elements of a Hobbs Act crime; interference with commerce, and extortion" (*Stirone* v. *United States*, 361 U.S. 212, 218), and concluded that "Assuming that the defendant's solicitation and extraction of the $4,000 payment was extortion and not merely a 'bribe' there is here absent proof of the element of 'interference with commerce'." (353 F.2d at 361) The Court ruled: "The making or the pressing of the complaint * * * would not in any respect have obstructed, delayed or affected commerce or any article in commerce * * * nor would the initiation and pressing of complaints against other members of Associated, have done so." (353 F.2d at 361) To the extent then that the Third Circuit views the Hobbs Act as proscribing only threats, "the carrying out of which would obstruct commerce" (*United States* v. *Pranno*, 7th Cir. 1967, 385 F.2d 387, 389), it may be considered to be in harmony with former decisions of the Seventh Circuit, but in conflict with the latest decision of that Circuit as expressed in the present case.

It is important that the Court review this case to determine the limits of the Hobbs Act and resolve the apparent conflict between the Third and the Seventh Circuits as to what those limits are. In this era, the decision of the Seventh Circuit in the present case fairly well emasculates

the critical difference between the essentially local offenses of extortion and robbery and the peculiarly federal offense described by the Hobbs Act, interference with interstate commerce. See, *Stirone* v. *United States*, 361 F.2d 212, 218; *United States* v. *Stirone*, 3rd Cir. 1958, 262 F.2d 571, 578, 579 (dissenting opinion). Review of this case is necessary to re-establish that critical difference.

II. There was no proof that Petitioner conspired to extort money from Riley or the Riley Management Company.

The decision below rests upon two related propositions which together, or separately, represent an attempt to enlarge the permissible scope of conspiracy prosecutions. It is necessary to review these propositions by which the majority was able to conclude that both Evans and Battaglia[1] conspired with Petitioner to commit the peculiarly federal offense of obstructing interstate commerce by a threat of extortion in order to carry out this Court's warning that it would "view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy

[1] Neither majority nor dissent voiced an opinion as to whether Pramno was a party to the charged conspiracy. Judge Swygert assumed he was not. (See, App. A, *infra*, p. App. 13) In view of the abundance of evidence of the friction and "back-biting" between Petitioner and Pramno, both before and after the threat (see Statement, *supra*, pp. 18-21), the evidence that the two were antagonists, rather than partners, even in the scheme to defraud as it eventually turned out (see Statement, *supra*, p. 19), and the lack of any evidence that Pramno knew, or had cause to know, of the threat to Riley, this assumption was well founded. If then Evans and Battaglia were not parties to the charged conspiracy, Petitioner could not be convicted of conspiracy. *Hartzel* v. *United States*, 322 U.S. 680.

prosecutions." *Grunewald* v. *United States*, 353 U.S. 391, 404.[2]

The evidence showed that Petitioner, Evans, Pranno, DiVito and LaKey originally entered into an agreement to obtain money from the Riley Management Company by fraud and deceit. So much has been conceded by both the majority and dissent below. (App. B, *infra*, pp. App. 30-32; 54, 56, 61) We may assume *arguendo* that, by his conduct in February (or March) 1965, Battaglia was part of this agreement. At this point, however, the opinions diverge, and this divergence is representative of a doctrinal difference concerning the scope of conspiracy prosecutions which should be resolved by this Court.

The majority concludes that "On this record, it is obvious that Evans knew of Riley's fear of Amabile * * * [and it] would be unreasonable to suppose that Evans would be so closely associated with Amabile *in the scheme to defraud* without realizing that Amabile would * * * " employ coercive means. (App. A, *infra*, pp. App. 30-31; emphasis added.) But this proposition, as stated, is in conflict with the admonitions by the Court against basing guilt on evidence of association (*Krulewitch* v. *United States*, 336 U.S. 440, 454, concurring opinion)[3] or arriving at judgments of guilt by piling inference upon in-

[2] See also *Krulewitch* v. *United States*, 336 U.S. 440; *Lutwak* v. *United States*, 344 U.S. 604; *Delli Paoli* v. *United States*, 352 U.S. 232; *Bollenbach* v. *United States*, 326 U.S. 607; *United States* v. *Bufalino*, 2nd Cir. 1960, 285 F.2d 408.

[3] See also, *United States* v. *Falcone*, 2nd Cir. 1940, 109 F.2d 579, aff'd, 311 U.S. 205; *Carbo* v. *United States*, 9th Cir. 1963, 314 F.2d 718; *United States* v. *Borelli*, 2nd Cir. 1964, 336 F.2d 376.

ference. *Ingram* v. *United States*, 360 U.S. 672.[4] Evans did not know of the threats. His only participation was in a scheme to defraud, the antithesis of extortion. There was evidence, moreover, that Amabile's role was to be kept secret from Riley (see Statement, *supra*, pp. 11-13), so that Evans could hardly expect or foresee the direct confrontation of Riley by Amabile that is indicative of extortion.

As to Battaglia, the majority finds that he "had 'embarked on a criminal venture of indefinite outline' and therefore, had to 'take his chances' as to the methods used by the other co-conspirators." (App. B, *infra*, p. App. 31-2) This broad proposition is in conflict with decisions of the Second Circuit that joint venturers take their chances as to the methods used by their associates only if those methods fall within the common purposes of the venture as all understand it. See, *United States* v. *Andolschek*, 2nd Cir. 1944, 142 F.2d 503, 507. *United States* v. *Peoni*, 2nd Cir. 1938, 100 F.2d 401, 403; *United States* v. *Crimmins*, 2nd Cir. 1941, 123 F.2d 271, 273. In *Crimmins*, Judge Hand highlighted the extent of the controversy here when he pointed out that "It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding." (123 F.2d at 273) And in this context he was only repeating what he had said in *Peoni*: "At times it seemed to be supposed that, once some kind of criminal concert is established, all parties are liable for everything anyone of the original participants does, and even for what

[4] See also, *United States* v. *Ross*, 92 U.S. 281; *Pereira* v. *United States*, 347 U.S. 1, 15-16 (dissenting opinion). Compare, *Bollenbach* v. *United States*, 326 U.S. 607; *Tot* v. *United States*, 319 U.S. 463, 467-68.

those do who join later. Nothing could be more untrue. Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; * * * " (400 F.2d at 403).

This "chance taking" proposition is also in conflict with decisions in the Sixth (*United States* v. *Barnes*, 1968, 383 F.2d 287) and Ninth (*Pritchett* v. *United States*, 1963, 313 F.2d 425) Circuits. Both Circuits have rejected the sprawling doctrine that partners in one criminal venture are criminally responsible for other criminal conduct of a co-partner "even though such criminal conduct was not shown to be necessary or usual to the partnership or known to the copartners." *United States* v. *Barnes*, 6th Cir. 1968, 383 F. 2d 287, 292. *Barnes* explains: "We are not dealing with a civil rule which holds generally that all partners are bound by the acts of any copartners done within the apparent scope of authority to serve partnership purposes. It might aid the financial success of an illegal * * * enterprise for a managing partner * * * [to commit some other crime]; but we do not believe that all copartners could be prosecuted for such crimes if they had no knowledge of them, and had not conspired to bring them about, even though their commission may have served, but was no part of, the objectives of or the motivation for the admittedly illegal partnership enterprise." (383 F.2d at 292)

These limits imposed by the Second, Sixth and Ninth Circuits serve to curtail any tendencies to "broaden the already pervasive wide sweeping nets of conspiracy prosecutions." The decision in this case does not recognize any limits; it encourages pervasiveness. The Court should grant its writ to resolve this fundamental difference and to consider this important question concerning limits on the scope of conspiracy prosecutions.

III. Refusal to permit Petitioner to inquire on cross examination a) into facts showing motive of William Riley for testifying and the consideration he received therefor, b) regarding his failure to mention previous threats of physical violence by Petitioner and another in prior statements given to Government Agents, and c) as to Riley's residence, deprived Petitioner of the right of cross examination guaranteed by the Sixth Amendment.

In *Pointer* v. *Texas*, 380 U.S. 400, this Court affirmed that the right of cross examination was firmly imbedded in the Sixth Amendment. See also, *Alford* v. *United States*, 282 U.S. 687; *Smith* v. *Illinois*, 390 U.S. 129; *Heard* v. *United States*, 8th Cir. 1919, 255 Fed. 829. Compare, *Jencks* v. *United States*, 353 U.S. 657; *Gordon* v. *United States*, 344 U.S. 414. Although recognizing this right in the abstract, the Seventh Circuit has announced new principles in the present case which promise to severely curtail this "essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U.S. 400, 405. Examination of these new principles ought to be undertaken to resolve the conflicts they entail and to settle questions of paramount importance that cannot help but occur in a vast number of criminal trials.

A. Recognizing that Petitioner had a right to explore Riley's motives for testifying in the Government's favor,[1] the majority, nevertheless, employed a variety of arguments for denying Petitioner that right in the present

[1] *United States* v. *Masino*, 2nd Cir. 1960, 275 F.2d 179; *Wheeler* v. *United States*, 1st Cir. 1965, 351 F.2d 946; *Harris* v. *United States*, 9th Cir. 1967, 371 F.2d 365; see also, McCormick, *Handbook of the Law of Evidence*, § 40, pp. 82-4 (1954 ed.). Compare, *Napue* v. *Illinois*, 360 U.S. 264, 269.

case. Thus it found in the established rule that a witness may not be impeached by a showing that he has been arrested and indicted, a basis for deciding that the right of cross-examination and the rule represent "conflicting interests" which the trial judge was entitled to balance. (App. A, *infra*, p. App. 6) Judge Swygert's dissent, however, points out the novelty of this theory of "conflicting interests" and suggests that it may be employed to defeat entirely the heretofore acknowledged right of a defendant to show that a witness against him expects to obtain leniency for his own problems in return for his testimony. (App. A, *infra*, pp. App. 19-21) So significant has this right been considered before, that a false answer con-

In arriving at this decision, the majority attempted to divine counsel's motives in asking Riley whether he was under indictment for theft in the state courts and whether he was under investigation by the Internal Revenue Service for income tax evasion. To do this it looked at Riley's subsequent cross examination, culled seven questions "so obviously improper that there has been no attempt on appeal to justify them" (App. A, *infra*, p. App. 7) from the record of counsel's 173 page cross examination (II App. 615-80, III App. 681-853), and concluded that the purpose of the restricted cross examination was "designed to prejudice the jury against Riley through sneer and innuendo rather than to impugn his veracity" (App. A, *infra*, p. App. 8), despite counsel's explicit offer of proof to the contrary. (See Statement, *supra*, pp. 24-26), and the failure of the trial judge to so find. Moreover, the fact that evidence may have an undesirable incidental secondary effect has never been regarded as a sufficient basis for its rejection (see, *Fairbanks* v. *United States*, D.C. Cir. 1958, 256 F.2d 251, 253), especially in view of the availability of cautionary instructions to the jury. Yet even this was overlooked by the fact that, taken in context, many of the so-called improper questions were designed to show either the association between Riley and Amabile or that Riley Management was not unduly impecunious by the payment of the second draw, but rather by Riley's own mismanagement.

cerning the witness' expected reward is cause enough to reverse the judgment. *Napue* v. *Illinois*, 360 U.S. 264.

A second argument used to defeat Petitioner's right to show Riley's motive for testifying was based on the view that the United States Attorney's Office is powerless to influence state criminal prosecutions and the investigations of the internal revenue service. (App. A, *infra*, pp. App. 8-9) Not only does this argument avoid practicality, but it conflicts with the decision of the Second Circuit in *United States* v. *Massino*, 2nd Cir. 1960, 275 F.2d 129, where the United States Attorney actually had interceded with the local authorities. If this argument is given acceptance, then all such "intercessions" will occur after the witness testifies rather than before, a state of affairs which would satisfy a sort of rubric, but which would do little to diminish the fact that consideration was still being promised in return for testimony. Compare, *Gordon* v. *United States*, 344 U.S. 414 (leniency not extended before testimony, but witness warned not to expect it unless he cooperated with government in prosecution of defendant).

B. To prove that Riley was not telling the truth when he testified that he had told investigating agents in his pre-trial statements about specific physical threats made by Amabile and Palermo in 1962 and 1963 and that proof of such disclosure was contained in his October 5, 1965, statement, the opinion below says, in effect, Petitioner should have introduced the statements and called the agents as his witnesses. (App. A, *infra*, p. App. 5; App. B, *infra*, pp. App. 39-40) This alone is not unusual. Certainly, had Petitioner wanted to call witnesses and introduce documents he would have had that right. Compare, *Gordon* v. *United States*, 344 U.S. 414, 420-21. But Petitioner could not be compelled to call witnesses or introduce documents, nor should he have been deprived of the right to require Riley, on cross-examination, to answer whether

the matters to which he had testified could be found in any one of his five pre-trial statements, and to further require him, upon receiving an answer that it did appear in one, to identify the portion[6] thereof that he felt contained the questioned material. Petitioner offered to prove by cross examination that the material was not in any statement. The right of cross examination is not exchangeable for the opportunity to call witnesses and introduce documents.[3] Prior decisions of this Court and others have recognized that to bring out facts tending to discredit the witness by showing that his testimony in chief was untrue is a right of cross examination. *Alford* v. *United*

[6] In arriving at the conclusion that it was, the decision below has misinterpreted the record and misapprehended several factors. First, the opinion states that Riley had not read the statements. (App. A, *infra*, p. App. 8) He had; he was given them to read during his grand jury appearance. (III App. 704) Second, the opinion states that Riley had no way of knowing whether the FBI had transcribed his complaints of physical threats. (App. A, *infra*, p. App. 8) He had. Not only had he read the statements, but he was given them during the cross examination and asked to point out where the complaints appeared. He said they were transcribed on the second page of the October 5, 1965, statement. He was then asked to point to the portion of that page which he felt contained reference to specific physical threats. The court would not permit this. (See, Statement, *supra*, p. 29) Third, the reference to *United States* v. *Borelli*, 2nd Cir. 1964, 336 F.2d 376, 391, is inapposite for there the witness had *denied* making certain statements to the FBI. Here, Riley affirmed making the complaints, and said they were in the statement before he was asked where they could be found. Fourth, the opinion states that Petitioner should have called witnesses to impeach Riley's testimony that the material was contained in the statements. But the court would not permit counsel to ask Riley if he had made the complaints in the succeeding four statements and thus Petitioner was unable to lay a foundation for calling impeaching witnesses. See, *Smith* v. *United States*, 6th Cir. 1960, 283 F.2d 10; *Williamson* v. *United States*, 9th Cir. 1962, 310 F.2d 192.

States, 282 U.S. 687, 692; *Heard* v. *United States*, 8th Cir. 1919, 255 Fed. 829, 832. "The omission from * * * reports [given to government agents] of facts related at the trial * * * are also relevant to the cross-examining process of testing the credibility of a witness' testimony." *Jencks* v. *United States*, 353 U.S. 657, 667; see also, *Clancy* v. *United States*, 365 U.S. 312, 316.

Certiorari should be granted to review whether a defendant may be made to substitute the presentation of evidence of his own for effective cross examination of Government witnesses.

C. Whatever had been done by the Petitioner was revealed almost exclusively through the testimony of William Riley. It was Riley alone who testified to the alleged threats made by Amabile, and it was the Petitioner's position at trial that Riley was testifying out of hope of reward from the Government (See Point III A, *supra*) and because of an animus against the defendant (See, e.g., III App. 657). Furthermore, it was part of the defense's theory that many of Riley's claims were recently fabricated, as was demonstrated by the failure of his 3500 statements to recite many of the alleged threats. (See Point III B, *supra*) Under these circumstances it was essential that the defense be given a full opportunity to cross-examine Riley concerning his address at the time of trial, in order to help establish his relationship with the Government.

The importance of this rudimentary cross-examination was recognized by the Court in *Smith* v. *Illinois*, 390 U.S. 129 (1968), decided subsequent to the trial of this case. There the Court expressed its concern that, "* * * when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross examination must necessarily be to ask the witness who he is and where he lives. The witness' name

and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross examination itself." 390 U.S. at 131.

Smith did not announce new principles. In *Alford* v. *United States*, 282 U.S. 687 (1931), the Court had said that inquiry as to a witness' place of residence "was an essential step in identifying the witness with his environment, to which cross examination may always be directed," and that "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting . . . ." 282 U.S. at 692-4.

The Seventh Circuit has adopted a strict view as to the right of the defense to inquire of a Government witness as to his residence. This view, based upon Mr. Justice White's concurring opinion in *Smith* (390 U.S. 129, 133-4), allows "that where there is a threat to the life of the witness, the right of the defendant to have the witness' true name, address and place of employment is not absolute. United States v. Varelli, 407 F.2d 735 (7th Cir. 1969). However, the threat to the witness must be actual and not a result of conjecture. Shaw v. Illinois, 394 U.S. 214, 89 S.Ct. 1016, 22 L.Ed. 2d 211 (1969). The Government bears the burden of proving to the district judge the existence of such a threat." *Palermo* v. *United States*, 7th Cir. 1969, 410 F.2d 468, 472; see also, App. C, *infra*, p. 67.

This interpretation does not conflict with Petitioner's basic claim that the defense should have been permitted to "place the witness in his proper setting." Even if we assume that the Government would have been able to show the district judge reason for withholding Riley's address

(because of the holding in *Palermo* that they had sufficiently done so in that case) although the judge summarily dismissed the prosecutor's request for a hearing and ruled that the defense was not entitled to make the inquiry on its face. *Palermo* recognizes that the defense does have a resulting right to ask other relevant questions on the subject. Here, Riley's exact address, that is, the street number, was less significant than the circumstances under which he was living, as those circumstances would have shown his relationship with the Government. Thus, if Riley was being maintained at a hotel by the Government, the defense should have been allowed to go into this to show Riley's "indebtedness" to the party for whom he appeared as a witness. Similarly, if the Government had arranged to move Riley to a different state, or to a foreign country, inquiry for the same purpose should have been permitted.

IV. Refusal to order production of the Grand Jury minutes of the testimony of Government witnesses Riley, LaKey and DiVito and the subsequent adoption of a prospective rule regarding the production of such minutes by the Court of Appeals deprived Petitioner of fundamental rights.

Two reasons were given by the Court of Appeals for its conclusion that denial of Petitioner's motion for the production of grand jury minutes was not erroneous: 1) Petitioner "did not show particularized need and cannot now supply that requirement by hindsight"; and 2) "* * * any error in this connection was of defendant's own making" by virtue of his not accepting an offer of the Assistant United States Attorney to turn the minutes over to the trial court for an *in camera* inspection. (App. A, *infra*, p. App. 11) Nevertheless, that Court has recognized the

force of the arguments in favor of disclosure and adopted a rule, prospectively, granting disclosure as a matter of right.

The assertion that Petitioner "made his own error" is not supported by the record and should not impede this Court's review of the right of defendants to obtain grand jury minutes and the propriety of granting that right but limiting it prospectively. Although Petitioner did not accept the Government's offer to allow the trial judge to examine the minutes *in camera*, he was not extended an opportunity to do so. Immediately after the Government made the offer, the trial court asked counsel for Petitioner the basis of his request. Directing himself to the court's inquiry rather than the Government's offer, counsel promised to provide authority following the noon recess. (I App. 195) At that time, however, without hearing from counsel, the court denied his request. Subsequent citation of *Dennis* v. *United States*, 384 U.S. 855, proved to no avail. Then, when counsel asked that the minutes be impounded and sealed, the court denied that request on the ground that he lacked power to order the Government to disgorge the minutes for any purpose. Attention was never directed to the Government's offer, and the Government did not venture to re-offer the minutes after having secured a ruling that the trial court felt powerless to compel disclosure or delivery. (See, Statement, *supra*, pp. 30-31) Under these circumstances it cannot be said that Petitioner made his own error in connection with this matter. The question of whether delivery should have been ordered under the circumstances and whether a procedure requiring delivery can be limited prospectively must still be considered.

Inferentially, at least, the opinion indicates that Petitioner has made a sufficient *a posteriori* showing of a particularized need. Not only were DiVito, LaKey and

Riley the three principal witnesses against Petitioner, but, in the main, their testimony concerned numerous conversations with Petitioner or his co-defendants. Much of this testimony was uncorroborated, particularly that of Riley concerning the various threats allegedly made by Amabile and Palermo. "Where the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all relevant aid which is reasonably available to ascertain the precise substance of the statements." *Dennis* v. *United States*, 384 U.S. 855, 872. In this case, moreover, Riley's 3500 statements indicated a glaring discrepancy between his pre-trial statements and his testimony relating to various pre-conspiracy threats allegedly made in 1962 and 1963 by Amabile and Palermo. (See, Statement, *supra*, p. 29) Thus, insofar as Riley at least was concerned, the need to use the transcript to impeach him, to refresh his recollection, to test his credibility were all particularized needs. *Dennis* v. *United States*, 384 U.S. 855, 870, citing *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683.

But while the Seventh Circuit has rejected Petitioner's claim based upon the denial of the grand jury minutes to him, it has avoided coming into conflict with the other circuits[1] by adopting, prospectively, the procedure promulgated in *United States* v. *Youngblood*, 2nd Cir. 1967, 379 F. 2d 365. Henceforth, the Court held, defendants will be permitted "access as of right to a witness' grand jury testimony on the subjects about which he testified at the trial, unless the Government can show that access should be denied." (App. A, *infra*, p. App. 12.) The procedure employed by the Court does not comport, however, with the criteria for such a prospective rule set forth by this Court

[1] See, *Schlinsky* v. *United States*, 1st Cir. 1967, 379 F.2d 735; *Cargill* v. *United States*, 10th Cir. 1967, 381 F.2d 849; *Worthy* v. *United States*, D.C. Cir. 1967, 383 F.2d 524.

in *Johnson* v. *New Jersey*, 384 U.S. 719; *Lankford* v. *Walker*, 381 U.S. 618 and *Tehan* v. *United States ex rel Shott*, 382 U.S. 406.

Disclosure of grand jury minutes affects "the very integrity of the fact finding process" and averts "the clear danger of convicting the innocent." See, *Johnson* v. *New Jersey*, 384 U.S. at 727-28; *Lankford* v. *Walker*, 381 U.S. at 639; *Tehan* v. *United States ex rel. Shott*, 382 U.S. at 416. This is clear, of course, because the minutes are used "to impeach a witness, to refresh his recollection [and] to test his credibility," (*Dennis* v. *United States*, 384 U.S. 855, 870, citing, *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683) matters which are the very essence of the fact finding process and are universally recognized as the principal method for preventing the conviction of the innocent. See, *Pointer* v. *Texas*, 380 U.S. 400, 404; *Alford* v. *United States*, 282 U.S. 687, 692.

This question of general importance, whether procedures to compel the disclosure of grand jury minutes as a matter of right can be limited to prospective cases, should be decided by the Court.

CONCLUSION

For the foregoing reasons, as well as for those advanced by Petitioners Dave Evans and Salvatore Battaglia, Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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On the Brief

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

September Term, 1967 January Session, 1968

No. 16314

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

JOSEPH AMABILE, *Defendant-Appellant*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 26, 1968

Before SCHNACKENBERG, SWYGERT and CUMMINGS, *Circuit Judges*.

CUMMINGS, *Circuit Judge*. This appeal is to review Joseph Amabile's conviction for conspiring with Salvatore Battaglia, Dave Evans and non-defendant Rocco Pranno to violate the Hobbs Act (18 U.S.C. § 1951). The gravamen of the charge was that in January 1965, the conspirators obtained $48,500 from the Riley Management Corporation through threats of bodily harm to its president and economic harm to both. Battaglia's and Evans' convictions were affirmed in ..... F.2d ..... (7th Cir. 1968).

Amabile first argues that the Government failed to prove that he conspired to obtain money from Riley Management Corporation by extortion. A like argument was advanced by Battaglia and Evans and rejected in their appeals. For the reasons stated in the prior opinion, the evidence was sufficient to support Amabile's conspiracy conviction. See ____ F.2d ____ at pp. ____.

Amabile's next point is that his "extortionate threat made against a man [William Riley, president of the Riley Management Corporation] whose business touches interstate commerce" does not violate the Hobbs Act because the threat was only indirectly and remotely connected with interstate commerce. We disposed of this issue in the opinion dealing with Amabile's co-defendants. See ____ F.2d at p. ____. However, since Amabile presses the issue to considerable extent, further discussion may be warranted.

The Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215. As to the commerce power, the Supreme Court has recently stated in *Katzenbach* v. *McClung*, 379 U.S. 294, 305:

> "The power of Congress in this [commerce] field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere."

Since Congress has used all its "broad and sweeping" commerce power in enacting the Hobbs Act, the courts have rightly attributed great scope to the statute. Thus

in language applicable here, Judge Sanborn stated as follows in *Hulahan* v. *United States*, 214 F.2d 441, 445 (8th Cir. 1954), certiorari denied, 348 U.S. 856:[1]

> "It seems apparent from the language of the statute that it was the intent of Congress to protect interstate commerce against extortion or attempted extortion which in any way or *in any degree* reasonably could be regarded as affecting such commerce. The exaction of tribute from contractors engaged in local construction work who are dependent upon interstate commerce for materials, equipment and supplies, or who are engaged in constructing facilities to serve such commerce, is, in our opinion, proscribed by [the Hobbs Act]." (Emphasis supplied)[2]

As in *Hulahan*, Amabile was exacting tribute from a builder "dependent upon interstate commerce for materials, equipment and supplies" and was therefore within the reach of the Hobbs Act. It is unnecessary that the extortion have as substantial an effect on interstate commerce as a combination in restraint of trade. *United States* v. *Malinsky*, 19 F.R.D. 426, 428 (S.D. N.Y. 1956).

As pointed out in our prior opinion, the $48,500 payment made pursuant to Amabile's threats depleted Riley Management Corporation's reserves. Depletion is pertinent in considering commerce under the Hobbs Act. Thus

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[1] Recent instances where this Court has affirmed Hobbs Act convictions in cases involving construction projects are *United States* v. *Kramer*, 355 F.2d 891, (7th Cir. 1966), certiorari denied (except on an irrelevant point) 384 U.S. 100, and *United States* v. *Sopher*, 362 F.2d 523 (7th Cir. 1966), certiorari denied, 385 U.S. 928.

[2] The *Hulahan* case has been followed by this Court at least twice: *United States* v. *Floyd*, 228 F.2d 913, 916, 918-919 (7th Cir.-1956), certiorari denied, 351 U.S. 938; *United States* v. *Green*, 246 F.2d 155, 160 (7th Cir. 1957), certiorari denied, 355 U.S. 871.

in *United States* v. *Provenzano*, 334 F.2d 678, 692 (3d Cir. 1964), certiorari denied, 379 U.S. 945, a Hobbs Act commerce instruction was approved which stated in part:

> "Where the resources of a business are depleted or diminished in any manner or degree by payments of money obtained by extortion the capacity to efficiently conduct such business is to the extent of the drain on its resources likely to be impaired."

The Hobbs Act does not require that the threats to Riley and his family be directly aimed at interstate commerce. In the statute Congress defined extortion as obtaining property through "actual or threatened force, violence, or fear" (18 U.S.C. § 1951(b)(2)). There is no requirement that the extortion be directed at interstate commerce as long as the extortion "in any way or degree obstructs, delays, or affects commerce" (18 U.S.C. § 1951(a)). To accept appellant's construction would mean that Congress had exempted the most efficacious of threats. Certainly Congress did not intend such an anomalous result.

Like his co-defendants, Amabile asserts that the District Court unduly restricted cross-examination. He first asserts that he was not permitted to undermine Riley's testimony that the Lansing, Illinois, building project was meant to be kept a secret from Amabile and Palermo. As we pointed out in our earlier opinion, "Evans' counsel was permitted to elicit that the Riley company had prepared a brochure to promote sales of the Lansing apartments, and that the Hammond *Times* published a story about the project in August, 1964." ___ F.2d ___. In addition Battaglia's counsel was permitted to cross-examine Riley, without objection, about advertising for the Lan-

sing project, selling units thereof before construction and taking salesmen to Las Vegas to promote this project. It is clear that Amabile was given sufficient latitude to rebut the secrecy of the Lansing project.

Amabile also complains of the District Court's refusal to let his counsel ask Riley about the contents of five statements he had given to the Federal Bureau of Investigation, made available to defense counsel under the Jencks Act (18 U.S.C. § 3500). Riley had already testified that he advised the FBI of the 1962-1963 threats of Palermo and Amabile and that he had not read the statements. He of course had no way of knowing whether his complaints of the physical threats of Amabile and Palermo had been transcribed by the FBI in those statements. Amabile's counsel made no attempt to introduce the statements, so that they are not in the record. If the FBI statements were actually devoid of any reference to the Amabile-Palermo threats, Amabile's counsel should have called the recording FBI agents in order to lay a proper foundation for the admission of the five statements to impeach Riley. As Judge Friendly ruled in *United States* v. *Borelli*, 336 F.2d 376, 391 (2d Cir. 1964), certiorari denied, 379 U.S. 960:

> "when the witness is confronted with what appears to be an inconsistency, he may deny having made the contradictory statement to the agent and counsel's only recourse would be to call the agent and endeavor to have him prove the contrary."

See also 3 Wigmore on Evidence (3d ed.) § 1025.

Amabile repeats another argument offered by his co-defendants in their appeals, namely, that he was not permitted to show that Riley expected consideration in a state court theft indictment and in a federal tax investigation in return for his testimony herein. We rejected this

argument in the prior appeal in the last paragraph of our discussion under "Restriction of Cross-examination and Refusal to Admit Defense Exhibits" (F.2d at p.): The elaboration of this subject in Amabile's brief calls for a more detailed discussion.

Of course, a defendant may normally show that a prosecution witness expects favorable treatment from the Government in return for his testimony. 3 Wigmore on Evidence (3d ed.) §967. It is also well settled that the credibility of a witness may not be impeached by showing that he has been arrested and indicted. *Michelson* v. *United States*, 335 U.S. 469, 482; *United States* v. *Bolden*, 355 F.2d 453, 457 (7th Cir. 1965), certiorari denied, 384 U.S. 1012; Wigmore, *op. cit.*, §980a. This principle applies *a fortiori* to a federal tax investigation that has not resulted in charges being brought against the witness. In the present case, the District Judge was faced with a collision of these two principles. He was entitled to balance the conflicting interests and therefore did not abuse his discretion in keeping Riley's theft indictment and federal tax investigation from the jury.

Viewed in isolation, Amabile's effort to explore Riley's motives for testifying in the Government's favor might be proper. But we must heed the counsel proffered in *Johnson* v. *United States*, 318 U.S. 189, 202 (concurring opinion):

> "In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution."

Applying this counsel, Amabile's entire cross-examination of Riley has been scrutinized.

Riley was subjected to a lengthy cross-examination, and Amabile's attempts to go into the state court indictment and tax investigation occurred very early. Thereafter, on at least seven occasions, Riley was asked questions implying that he was an unsavory character and financially irresponsible.[3] Counsel for Amabile then again sought to return to the state court proceedings against Riley. The series of intervening questions was so obviously improper that there has been no attempt on appeal to justify them. Considering the impropriety of the entire inquiry,

[3] Seven such occasions are as follows:

"Q. Weren't you arrested while you were drunk for exposing yourself?"

* * *

"Q. Did you ever get into a fight with a young man at the El Morrocco Club because you were so drunk?"

* * *

"Q. As a matter of fact, isn't it true in order to get that loan you bribed one of the officers [of the savings and loan association]?

"A. No, sir.

"Q. And paid him $25,000?"

* * *

"Q. Did you know it was an offense against the laws of the United States to bribe an official of a loan association for the purpose of obtaining a loan?"

* * *

"Q. Weren't you sued by Margaret Gillespie for fraud?"

* * *

"Q. As a matter of fact, you were broke at that time."

* * *

"Q. * * * did you sign a check to a payee by the name of Rona for $23,000 which came back 'NSF'?"

it is patent that Amabile's references to the state indictment and federal tax investigation were designed to prejudice the jury against Riley through smear and innuendo rather than to impugn his veracity. Cf. *United States* v. *Pennix*, 313 F.2d 624, 628, 630 (4th Cir. 1963).

The District Court's rulings are also supportable on the ground that appellant's questions do not appear sufficiently likely to have developed evidence that would have significantly weakened the Government's case" by showing the witness' bias. *United States* v. *Jones*, 360 F.2d 92, 96 (2d Cir. 1966), certiorari denied, 385 U.S. 1012. The United States Attorney does not control investigations being conducted by the Internal Revenue Service. Such investigations are common and usually involve no threat of an indictment. As to the state court criminal action, the United States Attorney was of course not empowered to accord any consideration. On this record, the District Court could properly conclude that the questions were speculative, unrelated to the charges against the defendant and not of sufficient probative value to show bias. *District of Columbia* v. *Clawans*, 300 U.S. 617, 632;[1] *Lott* v. *United States*, 230 F.2d 915, 918 (5th Cir. 1956), certiorari denied, 351 U.S. 953; *Leary* v. *United States*, 383 F.2d 851, 868 (5th Cir. 1967); *United States* v. *Higgins*,

[1] In *Clawans* the reversal of the District Court was affirmed, but the Court observed (300 U.S. at p. 632):

> "The extent of cross-examination rests in the sound discretion of the trial judge. Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, *and of slight bearing on the bias and credibility of the witnesses*, are not reversible errors." (Emphasis supplied)

362 F.2d 462 (7th Cir. 1966), certiorari denied, 385 U.S. 945; *Abeyta* v. *United States*, 368 F.2d 544 (10th Cir. 1966).[5]

Because the United States Attorney was not empowered to influence the course of the state theft case or the tax investigation, and because the questions, in the light of other improper questions as to Riley during his cross-examination, were part of a smear campaign, we cannot say that the District Court abused its discretion in its rulings concerning these two subjects.

Amabile claims that his counsel was given insufficient time to read a 6 page statement that witness Henry LaKey had given to the FBI.[6] This statement was delivered to defense counsel under the Jencks Act at 10 A.M. on April 21, 1967. He had sufficient opportunity to read it from then until 2 P.M., when the usual noon recess ended and the cross-examination of LaKey began. There has

[5] Amabile has cited no case holding that it is reversible error to refuse to allow a defendant to show that a prosecution witness is biased because he expects favorable treatment on a pending indictment in another jurisdiction or in a tax investigation. In *United States* v. *Masino*, 275 F.2d 179 (2d Cir. 1960), favorable treatment had actually been accorded to the witness, and in *Gordon* v. *United States*, 344 U.S. 414, the trial judge warned the witness awaiting sentence on a guilty plea that leniency depended upon cooperation with the government. *Wheeler* v. *United States*, 351 F.2d 946 (1st Cir. 1965), and *Harris* v. *United States*, 371 F.2d 365 (9th Cir. 1967), are distinguishable because they involved direct financial benefits to the witness.

[6] This statement is part of the record on appeal and took us and Government counsel less than 11 minutes to read. The District Court was able to digest and rule on ten such statements by witness Riley during the April 27th luncheon recess.

been no showing that his cross-examination of LaKey would otherwise have been different if more time had been allowed for study of LaKey's statement. Co-defendants' counsel did not even raise the point on appeal. In the absence of a showing of prejudice, the District Court did not abuse its discretion by allowing only such time as is "reasonably required for the examination of such statement" (18 U.S.C. § 3500 (c)).

Battaglia contended on his appeal that the Government should have granted his request for production of Mike DiVito's grand jury testimony. We held that production was unnecessary. See F.2d . In addition to DiVito's grand jury testimony, Amabile insists that he was entitled to the minutes of the grand jury testimony of witnesses Henry LaKey and William Riley.[7] Each request was made during the cross-examination of these witnesses. We find no error was committed by the District Court's failure to turn over these grand jury minutes.

Amabile relies principally on *Dennis* v. *United States*, 384 U.S. 855, but that case adheres to the earlier standard that a trial court need not allow the defense to examine

[7] Excerpts from Riley's grand jury testimony were appended to Battaglia's petition for rehearing of his appeal. They show that Amabile purportedly made the following threat to Riley in 1964 as to the tax investigation of Riley:

> "Don't tell them anything. You know what happens to guys who talk, don't you?"

Riley replied to Amabile and Palermo: "What is the matter with you guys? On one hand you tell me you will kill me if I don't pay you the money; on the other hand these guys [Internal Revenue agents] tell me they will put me in jail."

grand jury minutes in the absence of a showing of a particularized need. At the time that Amabile's counsel requested the grand jury testimony of each of these witnesses, unlike counsel for the defendants in *Dennis*, he did not show particularized need and cannot now supply that requirement by hindsight.

Here, as in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, and *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, defendants sought a wholesale disclosure of grand jury testimony as a matter of right, whereas in *Dennis* the defendants only sought a disclosure of particular testimony.

Moreover, in *Dennis*, there was a 7-year time lag between the grand jury and trial testimony. Thus as Judge Waterman pointed out in *United States* v. *Youngblood*, 379 F.2d 365, 367 (2d Cir. 1967), "there was reason to assay the latter [trial] testimony, some of which is 15 years after the event against the much fresher testimony before the grand jury" concerning occurrences between 1948 and 1955. Here there was no such significant interval between the 1966 grand jury testimony of these witnesses and their 1967 trial testimony.

When Amabile's counsel asked to inspect the grand jury testimony, the Assistant United States Attorney offered to give a copy to the Court for an *in camera* inspection.[8] This offer was not accepted by defense counsel. If it had been accepted, the statements might have been turned over to them, so that any error in this connection was of defendant's own making.

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[8] The Supreme Court has not disapproved of *in camera* inspection by a trial court in order to enable it to rule on a defense motion for production of grand jury testimony. *Dennis* v. *United States*, 384 U.S. 855, 874.

For all these reasons, there was no abuse of discretion in denying production of the grand jury transcripts.

In *United States* v. *Youngblood*, 379 F.2d 365, 370 (2d Cir. 1967), the Court of Appeals for the Second Circuit promulgated a prospective rule giving the defense access as of right to a witness' grand jury testimony on the subjects about which he testified at the trial, unless the Government can show that access should be denied. At the oral argument of this appeal, the Government stated that it had no objection to such a prospective rule in this Circuit. We approve of the *Youngblood* procedure and adopt it with respect to trials commencing after this judgment is entered.

Amabile's final point is that the District Court erred in failing to order a pre trial preliminary examination before a commissioner pursuant to Rule 5(c) of the Federal Rules of Criminal Procedure.* However, by its terms, Rule 5 was meant to afford an arrested person an opportunity to challenge the existence of "probable cause to believe that an offense has been committed and that the defendant has committed it." As the Supreme Court has stated, a preliminary hearing under Rule 5 is not required where, as here, an indictment has already been returned (*Jaben* v. *United States*, 381 U.S. 214, 220), for the grand jury already has found probable cause for holding the defendant for trial. *Bayless* v. *United States*, 381 F.2d 67, 71 (9th Cir. 1967). *Sciortino* v. *Zampano*, 385 F.2d 132, 133 (2d

* Rule 5(c) provides in pertinent part:

> "• • • If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. • • •"

Cir. 1967), certiorari denied, 390 U.S. 906.[10] Neither the language of Rule 5 nor its history supports Amabile's assertion that its purpose was to afford pre-trial discovery.

The judgment of the District Court is affirmed.

No. 16314.

SWYGERT, *Circuit Judge*, dissenting.

I am constrained to dissent on several grounds. First, I adhere to the views expressed in my dissent in *United States* v. *Battaglia, et al.*, No. 16312 and No. 16313 (7th Cir. Jan. 9, 1968) that there was insufficient evidence of a conspiracy engaged in by Amabile with Battaglia and Evans "to obstruct, delay and affect commerce" in the movement of materials for the construction of the Riley dwelling units in Lansing, Illinois by means of extortion.

Second, regardless of the question of the sufficiency of the evidence to show a conspiracy to extort money, there was no proof of a violation of the Hobbs Act, 18 U.S.C. § 1951. Although this issue was presented obliquely in the Battaglia appeal, Amabile has advanced arguments which bring the question into sharper focus.

The evidence showed that during the construction of the Lansing project, Riley obtained building materials from suppliers located outside the State of Illinois. There was no evidence, however, that there was any delay in the ship-

[10] In *Sciortino*, Judge Hays showed that the contrary rule in *Ross* v. *Sirica*, 380 F.2d 557 (D.C. Cir. 1967), was not supported by a majority of that Court, nor has it been adopted in any other Circuit. See 385 F.2d at p. 134.

ment or delivery of these materials. Moreover, there was no evidence that any extortion threat directed against Riley carried with it, express or implied, a threat that the work on the Lansing project would be stopped or hindered.

In *United States* v. *Pranno*, 385 F.2d 387, 389 (7th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3346 (Mar. 5, 1968), we said:

> The Supreme Court has made it clear that the statute is to be construed broadly and is not limited to conduct which directly and immediately obstructs a particular movement of goods in interstate commerce. Extortion by threat to disrupt a local activity the stoppage of which would in turn result in stoppage of interstate shipment of raw materials essential for that activity falls within the act. The statute seems to be read as not only prohibiting the obstruction of commerce by extortion, but also prohibiting extortion by any threat, *the carrying out of which would obstruct commerce.* (Emphasis added.)

I interpret this statement to mean that a threat to extort proscribed by the Hobbs Act must have a reasonable causal relation to interstate commerce. The likelihood of an obstruction to the flow of commerce must be the result of the threat. This essential nexus is missing in the instant case.

The majority, quoting from *Hulahan* v. *United States*, 214 F.2d 441 (8th Cir.), *cert. denied*, 348 U.S. 856 (1954), says that "Amabile was exacting tribute from a builder 'dependent upon interstate commerce for materials, equipment and supplies' and was therefore within the reach of the Hobbs Act." The facts in that case, however, were entirely different from those presented here. There the

defendant, a labor union representative, conspired to extort money from local construction companies by threats of labor unrest. These companies were dependent for the continuation of work undertaken by them upon local labor represented by the defendant and upon supplies and materials shipped interstate. Thus the extortion threats, if not complied with, would in all probability have brought a cessation of work on the project, thereby interrupting the interstate shipments of construction materials. In the instant case, however, there was no such probability that Amabile's threats to Riley, if not complied with, would have resulted in the interruption of the shipment of construction supplies and materials for the Lansing project. (In fact, it was to Amabile's advantage that the Lansing project proceed without interruption; for only then would Riley have authorized Carlson Construction Company to request "draws" for funds upon the Lawn Savings & Loan Association).

The majority also makes reference to the fact that the "$48,500 payment made pursuant to Amabile's threats depleted Riley Management Corporation's reserves." If a depletion of reserves is all that is necessary to show the requisite effect on commerce, then a threat of any kind to extract money made to a person who happens to operate a business engaged to any extent in interstate commerce comes within the statute's proscription. Under this rationale, a retail store owner, for example, would be afforded federal protection from extortion, regardless of the nature or the likely effect of the threat, simply because his stock of merchandise had in some measure moved in interstate commerce. I do not believe that the Hobbs Act was in-

tended to have such a broad reach. In that connection, Judge Hastie's statement in his dissent in *United States* v. *Stirone*, 262 F.2d 571, 578, 579 (3d Cir. 1958), *rev'd on other grounds*, 361 U.S. 212 (1960), is pertinent:

> [I]t should be considered and kept in mind that the control and punishment of local extortion is primarily the business of local or state government. The Hobbs Act is an auxiliary and partially duplicating federal superimposition on state law enforcement. In the view of Congress this is a desirable measure of federal assistance to the states in the exercise of their police power. But where state power and responsibility are thus primary and the national government is merely performing an auxiliary function, we should not be eager to stretch federal jurisdiction to cover doubtful cases offering a tenuous or speculative theory of federal jurisdiction.[1]

Third, an error which alone would require reversal (presented rather cursorily in the Battaglia and Evans appeals) relates to the district judge's restriction of Amabile's cross-examination of William J. Riley. Counsel for Amabile attempted to bring before the jury the facts that Riley was under indictment for theft in the state court, that he was under investigation by the Internal Revenue Service for tax evasion, and that his testimony was given in the hope of securing favorable treatment

[1] The majority quotes from *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), to support the proposition that, "Since Congress has used all its 'broad and sweeping' commerce power in enacting the Hobbs Act, the courts have rightly attributed great scope to the statute." I respectfully submit that the abstract language quoted from *McClung* has no application to the instant case. A decision upholding the constitutionality of the Civil Rights Act of 1964 under the commerce power can hardly have pertinency to the intended scope of the Hobbs Act.

from local and federal law enforcement officers concerning his allegedly illegal conduct. The district judge refused to permit cross-examination on these subjects.[2]

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[2] The relevant portion of the transcript reads:

[Mr. Bellows, Amabile's counsel]:

Are you the same William G. Riley who was indicted by the Criminal Court of Cook County for thievery in 1966 in the month of February.

Mr. Lamendella: [Assistant United States Attorney] I will object to that, your Honor.

The Court: I will sustain the objection. Mr. Bellows, you know better than that.

Mr. Bellows: I will connect it up, your Honor.

The Court: Mr. Bellows, you know better than that and I direct the jury to disregard that question.

By Mr. Bellows:

Q. Are you under indictment in the Criminal Court Cook County?

Mr. Lamendella: I will object to that.

The Court: I sustain the objection and I direct counsel, Mr. Bellows, to refrain from asking that kind of question. I direct the jury to disregard that question.

Mr. Bellows: May I have a side-bar conference, your Honor, with reference to this?

The Court: No, no side-bar conference after those questions, sir.

Mr. Bellows: May I be permitted to make an offer of proof outside the presence of the jury?

The Court: In respect to that last question, you may.

* * *

Mr. Bellows: Your Honor, my offer of proof is as follows: I expect to show by cross examination and it may be verified, if you choose to do so, if he denies the fact, that he was indicted in the month of February, 1966, for the crime of theft which is a felony; that the matter has been pending now over a year and that the reason for the extraordinary delay in bringing this matter to justice for a crime of theft—actually it was forgery, but under our new statute, your Honor, it is con-

The majority concedes that when "viewed in isolation" defense counsel's "effort to explore Riley's motives for testifying in the Government's favor might be proper." The majority goes on to say, however, that a defendant's right to show that a prosecution witness expects favorable treatment from the Government in return for his testimony

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sidered to be theft—is that he expects to get consideration, your Honor, from the court and the prosecution in Cook County for his cooperation with the government in this case and for his testimony in this case.

For that reason, your Honor, I think it is extremely important to show motive and reason for his testimony in this case.

The Court: What is the government's position in respect to the offer of proof of the defendant Amabile?

Mr. Lamendella: May we have just a moment?

The Court: Yes.

Mr. Lamendella: If this offer is being made, your Honor, to impeach the witness on the basis of an indictment, we object.

The Court: Do you object to the offer?

Mr. Lamendella: Yes, we do.

The Court: I sustain the objection.

Bring in the jury.

Mr. Bellows: May I add one more point, your Honor?

The Court: I have ruled on your offer. You can't add to an offer once it is made, sir.

Mr. Bellows: I want to explain the position of Lamendella to be inconsistent with my offer. He says he objects to the indictment. This is beyond the indictment.

The Court: He said he objected to the offer.

Mr. Bellows: Well, he said to the indictment.

The Court: You object to the offer of proof?

Mr. Lamendella: I do, your Honor.

* * *

The Court: You may continue, Mr. Bellows, with the cross examination of this witness.

By Mr. Bellows:

Q. Mr. Riley, are you presently under investigation by the

must be balanced against the rule that the credibility of a witness may not be impeached by showing that he has been indicted or is under investigation, and that the balancing of these conflicting rules entitled the district judge to use his discretion in deciding whether to permit cross-examination on Riley's expectation of favorable treatment.

I do not believe that a conflict between these evidentiary rules, such as the one the majority attempts to erect, exists. The right of a defendant in a criminal prosecution to cross-examine witnesses testifying against him is guaranteed by the sixth amendment to the Constitution. Courts have not been grudging in their protection of this right. As the Supreme Court recently stated in *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965):

Internal Revenue for evasion of taxes?

Mr. Lamendella: I will object to that, Your Honor.

The Court: I sustain the objection.

Mr. Bellows: May I make another offer of proof?

The Court: Yes.

* * *

Mr. Bellows: My offer of proof, your Honor, is that Mr. Riley, the witness on the stand, is presently under investigation by the Internal Revenue; that he has two lawyers prominent in the tax field in criminal cases representing him, and that if he were cross examined, your Honor, he would admit, I am sure, that he knows that his financial affairs are under investigation by the Internal Revenue for failure to account for taxes and for the evasion of taxes, and that his books are in the hands of the Internal Revenue agents, and that he expects to get consideration, your Honor, from the government for his cooperation with them in this case and for his testimony in this case.

The Court: What is the position of the government in respect to the offer of proof of the defendant Amabile?

Mr. Lamendella: We object, your Honor.

The Court: I sustain the objection.

* * *

> There are few subjects, perhaps, upon which the Court and other courts have been more nearly unanimous than in their expressions of belief that the right of . . . cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Both the treatises and the case law recognize the propriety of the kind of cross-examination in which Amabile's counsel sought to engage. Thus Professor McCormick says:

> The law recognizes the slanting effect upon human testimony of the . . . self interest of the witness in the outcome of the case. Any such partiality, proceeding from any acts, relationships or motives, may be proven to impeach credibility . . . . [One such instance is] in a criminal case when the witness testifies for the state and it is shown that an indictment is pending against him, *e.g.*.
>
> C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 40, at 82, 83, 84 (1954).

See Harris v. United States, 371 F.2d 365 (9th Cir. 1967); *Wheeler v. United States*, 351 F.2d 946 (1st Cir. 1965); *United States v. Masino*, 275 F.2d 129 (2d Cir. 1960). As the Second Circuit observed in *Masino*:

> Cross-examination is proper when its purpose is to reveal bias or interest on the part of the witness being examined . . . . It was highly relevant and material to bring out that the state court charge . . . had been quashed upon the intercession of the Assistant United States Attorney as was claimed by the defense and not denied by the government.[*] This is the kind of

[*] The majority says, "As to the state court criminal action, the United States Attorney was of course not empowered to accord any consideration." This observation ignores the possibility that the United States Attorney might have interceded with the local authorities on behalf of Riley, a situation similar to that occurring in *Masino*.

> situation where the widest possible cross-examination should be permitted. The appellant was entitled to have the jury know what had happened with respect to the charge, including any part which representatives of the government had played, so that the jury could draw its own conclusions with respect to possible motives for Brown's testimony. 275 F.2d at 132.

It is apparent from the record that the district judge perceived no "collision" of the kind suggested by the majority. Moreover, any attempt to show the bias of a witness by evidence that he is under indictment or investigation would create the same "collision." Thus the rule enunciated by the majority might preclude cross-examination of this kind in every case, a result contrary to the general rule permitting such inquiry. I believe that Amabile's efforts to question the credibility of Riley by showing his relationship to the Government and the reward he hoped to gain by reason of his testimony was entirely proper and should have been permitted.

Finally, the prejudicial trial errors discussed in my dissent in *Battaglia*, other than the exclusion of the testimony of character witnesses on behalf of Evans, have equal applicability to the instant case. These errors additionally and cumulatively require a reversal.

A True Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

OPINIONS

In the

United States Court of Appeals

For the Seventh Circuit

September Term, 1967 — January Session, 1968

Nos. 16312 and 16313

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

vs.

SALVATORE BATTAGLIA and DAVE EVANS,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

January 9, 1968

Before SCHNACKENBERG, SWAGERT and CUMMINGS, *Circuit Judges*.

CUMMINGS, *Circuit Judge*. In February 1967, defendants Dave Evans, Salvatore Battaglia and Joseph Anabile were indicted for conspiring with each other and with non-

defendant Rocco Pranno to violate the Hobbs Act.[1] The gist of the conspiracy charge was that defendants obtained $48,500 from the Riley Management Corporation by extortion. As required by the statute, the indictment also charged that the conspiracy affected interstate commerce, particularly with respect to that firm's construction of the King Arthur Apartments in Lansing, Illinois. The three defendants were found guilty by a jury. Evans' and Battaglia's appeals were heard together and are disposed of in this opinion. Annabile's appeal has not yet been heard.

Because Evans and Battaglia assail the sufficiency of the evidence, it must be summarized in some detail, viewed in the light most favorable to the Government. The evidence showed that William Riley was president of the Riley Management Corporation and that his company was building the King Arthur Apartments in Lansing, Illinois. Since 1962, defendant Evans had been one of his superintendents of construction and was assigned to the Lansing job in June 1964. At that time Riley and Evans discussed letting the sewer contracts for the Lansing apartments. Riley told Evans to line up

[1] In pertinent part, the Hobbs Act provides (18 U.S.C. § 1951):

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

* * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

subcontractors but to keep it secret "from the boys in Melrose Park," specifically from defendant Amabile (also known as Joe Shine) and from Nick Palermo. Riley told Evans that if Amabile and Palermo learned of the project, Riley would quite possibly be forced to use them again as subcontractors. Amabile had been connected with earlier Riley projects and had on several occasions threatened Riley and his family. Evans promised to keep the King Arthur Apartment information from Amabile and Palermo. However, a few days later, Riley was requested to go to the office of the Melrose Park Plumbing Company to meet Nick Palermo. Riley acceded. Both Palermo and Amabile were at the meeting. Palermo insisted on their receiving the plumbing contract for the Lansing project. Amabile said that otherwise he would stop Riley's other apartment building projects underway in Northlake and Westmont, Illinois, and that Riley "would be walking the streets with a candy cane." They told him they knew where Riley's mother lived and where his children went to school and that they had a baseball bat to handle "wise guys" like him.

A few days later, Riley complained to Evans about the leak to Amabile and Palermo. Riley told Evans that the Melrose Park group was not to receive any Lansing work from Riley Management Corporation. In August 1964, Riley instructed Evans to obtain a sewer contractor that was "foreign" to Amabile and Palermo.

Amabile had told Mike DiVito, a sewer contractor, that Amabile could not get the Lansing sewer work if DiVito's name were to be on the contract. Amabile advised DiVito and co-conspirator Rocco Pranno to come up with "a good clean fellow" if they were to obtain the business. They suggested Henry La-Key, an experienced

construction foreman. In September 1964, La-Key was hired by Pramno and DiVito as construction superintendent for a brand new firm, Carlson Construction Company, with the title of president.

DiVito said he and Pramno met with Evans and Amabile at Amabile's apartment in mid-September.[2] Pramno explained to Amabile that La-Key was "clean," but Amabile said that before giving Pramno and DiVito the Lansing sewer job he wanted $20,000 in cash. After looking at Evans' figures, DiVito told Pramno that there would be $20,000 in cash above Pramno's and DiVito's costs and profits for the job. Thereupon Pramno told Amabile that he would give him the $20,000 in cash and Amabile accepted the deal. Afterwards, Pramno told DiVito that Evans was Amabile's "guy" and that DiVito should never say anything in front of Evans because it would get back to Amabile.

La-Key testified that he attended a September meeting at Amabile's apartment with Evans, DiVito and Amabile. Amabile said that he was giving the Lansing sewer job to DiVito and Pramno and care about nothing except getting his $20,000 "off the top." In La-Key's presence, DiVito later relayed the message to Pramno about Amabile's demand for $20,000. Pramno directed La-Key and DiVito to meet with Amabile and Evans at the El Morocco lounge. At that meeting DiVito told Amabile that there would not be enough money in the contract to pay him $20,000 "off the top." Amabile then instructed Evans to figure a way to obtain more money from the job. Evans tore up the original contract and wrote a new contract, raising the price from $150,000 to $199,600.

[2] This may be the same Amabile apartment meeting described *infra* by La-Key.

Pramno gave DiVito and La Key approximately $13,000 to open a bank account for Carlson. In September 1964, Evans advised Riley that he had selected the Carlson Construction Company as the sewer contractor, that its reputation was excellent, and that it was operated by Henry La Key. Thereafter, Carlson Construction Company was awarded the sewer contract for about $150,000, to be paid directly to Carlson by a suburban savings and loan association through pay out slips issued by Riley's company. Carlson commenced the Lansing work in September or October 1964.

In mid October, Evans told La Key that the only contracts Evans let at Lansing were the ones Amabile told him to. Evans told La Key that he did not want Riley to know that Evans knew Amabile. In November, Amabile told La Key that Evans worked for Amabile, that Amabile had placed Evans in Riley's office, and that Evans would do whatever Amabile told him to do.

Before making the first draw from the savings and loan association, La Key told Amabile that the draw would be for $57,000. The next day, Amabile and La Key drove to the hospital where Evans was a patient. Amabile told La Key that Amabile was going to give $5,000 to Evans as his cut on the job, instead of $7,500. At the hospital Amabile gave Evans a "wad of bills." Evans reduced the estimate for the first draw by approximately $10,000.

On November 12, 1964, La Key received the first draw for $47,517.97 from the savings and loan association. He deposited $39,000 in Carlson's payroll account, retained $517 for his wages, and gave $8,000 to Rocco Pramno. Three days later, on Amabile's instructions, he drew out $20,000 from Carlson's account and gave it to Amabile.

In late November or early December, La Key accompanied Annabile to a farm in Pinegree Grove, Illinois, where Annabile introduced La Key to Battaglia as "running the job for them" in Lansing, Illinois. La Key heard Battaglia ask Annabile why Evans was getting "that kind of money." Annabile explained that he had made a deal with Evans who had "got us the job." Annabile also said he had promised Evans $7,500 and that he would take care of it. The next morning La Key mentioned to Evans that he had been at Battaglia's farm, and Evans warned him not to talk about it. Later, Pranno explained to Annabile that La Key should not have been taken to the farm. When Pranno attempted to hit La Key, Annabile stopped him, saying that he had La Key down to the farm and that "the man [Battaglia] says he is OK."

Prior to the first draw, Pranno, DiVito and La Key borrowed $5,000 because Carlson had run short of money. Pranno gave $4,500 of this amount to La Key to deposit for Carlson. This loan was not repaid by January 1965. Later that month Pranno told Annabile about this in DiVito's presence and asked Annabile to locate La Key so that the loan could be repaid. Several days later Pranno told Annabile that he was going to "the farm" to see "the man" in order to have Annabile obtain $5,000 from La Key to pay back the loan. At the resulting Battaglia farm meeting, attended by Annabile, Pranno and DiVito, Pranno mentioned that $20,000 from the Lansing sewer job was intended for Battaglia, who then nodded. The second time the $20,000 was mentioned for Battaglia, he said "yes." Battaglia also said:

> "'Well, I don't think Hank La-Key is such a bad guy, I like him, I like to work with him,' that they had other things coming up, and that they could use him again because he was clean."

He told Pranno that he would see what he could do for him as to the $5,000. On the drive back from the farm, Pranno told DiVito that he thought Annabile was short changing Battaglia and keeping $10,000 of the $20,000 for himself.

In January 1965, La Key advised Evans that Carlson did not have enough money to pay for necessary materials. Evans told La Key not to worry, saying:

> "'I will talk to Joe Shine [Annabile] and Joe Shine will talk to the man [Battaglia or Riley*]. We will see that the money is in the bank for you.'"

That same month Annabile told La Key to prepare the papers for the second draw. La Key said that the second draw would be for $60,000. Annabile said this was too high and that he would determine how much it should be and would straighten it out with Evans. That same night, Evans went to La Key's home and changed prices to bring the draw down to $48,000. Evans told La Key to present the second draw papers to Sol Meltzer, Riley's financial officer. However, Meltzer refused to authorize this draw. Thereupon, La Key went to see Annabile. Evans was present while La Key told Annabile what had happened. The next morning La Key picked up Evans. They entered Riley's office separately. Riley said that he would authorize a pay-out only when Carlson had paid its suppliers. At this meeting La Key told Riley that the cost of the job had gone up to $200,000. Evans explained that this was because "complications set in on the job."

La Key thereupon reported to Annabile that the second draw was still not authorized. Annabile told La Key to accompany him to Riley's office the next morning. On the

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* In other instances in the record, the evidence supports a finding that the expression "the man" refers to defendant Battaglia.

following day Ambile told Riley that he had to pay La Key because "the man" [Battaglia] wanted La Key paid. Ambile said that otherwise there would be "all sorts of trouble." Because of his fear of physical harm and economic collapse, Riley authorized the second draw of $48,512.48. This was the sum mentioned in the indictment and was deposited by La Key in a Carlson account. A few days later, Ambile instructed La Key to draw out $17,000. La Key thereupon obtained $5,000 in cash and a certified check for $12,000. Ambile insisted upon all cash and ordered Evans to accompany La Key to cash the check. After the $12,000 check was cashed, La Key and Evans went to Ambile's apartment, and La Key gave Ambile the $17,000. Ambile then gave La Key $5,000, of which La Key gave Evans $1,000. Ambile told La Key to take a vacation, and he went to Florida. Shortly thereafter, Evans advised La Key to return to Chicago, at Ambile's request. Ambile then complained that La Key had not been paying Carlson's bills, thus getting Ambile in trouble with Riley and "'making Dave Evans lose his job. You are taking my man [Evans] right out of Riley's.'" La Key then told Ambile that there was no money in the Carlson account because Ambile had bled it.

A few days later, La Key complained to Evans that the Carlson bills were unpaid because of Ambile's actions. La Key asked Evans why he didn't get out of the business. Evans replied:

> "'I can't get out. I am in too deep with Joe Shine [Ambile]. I know too much about the other people. * * * I can't quit. I wish I could get back to my own job where I came from.'"

Evans then said that he wished he had never met Ambile and reiterated that he was in too deep to quit.

Sufficiency of the Evidence as to Evans

Evans and Battaglia concede there was enough evidence of a conspiracy to obtain money from Riley Management Corporation by fraud. Evans admits that there was sufficient evidence that he was a party to that conspiracy. He also admits that Amabile used extortion to induce Riley to authorize the second draw. However, Evans contends that there is no evidence to show that the extortion was pursuant to a conspiracy of which he was a member. We reject that contention.

On this record, it is obvious that Evans knew of Riley's fear of Amabile. Although Evans took the stand, he significantly never explained that violence was not contemplated. La-Key was told by Evans that he would talk to Amabile, and that Amabile would talk to "the man" (Battaglia or Riley in this instance; see note 3 *supra*) in order to get the second draw paid. Evans knew that Riley was unwilling to pay the second draw because Carlson's bills were unpaid, and that Riley was afraid of Amabile. The jury could properly infer that Evans knew Amabile would induce Riley through fear to authorize the second draw. After the second draw, La-Key withdrew another $17,000 for Amabile, who then gave La-Key $5,000, who in turn gave Evans $1,000.[4] Even though he may not have spoken to Amabile about the second draw, Evans' own statement to La-Key showed his willingness to take part in a course of action which would cause payment by coercion. It would be unreasonable to suppose that Evans would be so closely associated with Amabile in the scheme to defraud without realizing that Amabile would employ coercive means for obtaining the second draw. Cf. *Pereira* v. *United States*, 347 U.S. 1, 12-13. As in *Leto* v. *United States*, 74 F.2d 66, 68, 69 (3rd Cir. 1934),

[4] Previously, according to La-Key, Evans had received another wad of bills" from Amabile.

Evans has resorted to a conspirator's common contention, made in extremity, that he was a party to a sub-conspiracy not charged in the indictment, but our digest of the evidence discloses evidence quite sufficient to sustain the allegations and finding of his participation in a single conspiracy to obtain money, encompassing extortion as well as fraud.

Evans has relied on *Stirone* v. *United States*, 361 U.S. 212; *United States* v. *Critchley*, 353 F.2d 358 (3rd Cir. 1965), and *Carbo* v. *United States*, 314 F.2d 718 (9th Cir. 1963), certiorari denied, 365 U.S. 861. None is apposite. In *Stirone*, the Court condemned the variance between indictment and proof. As we have seen, the proof here is consistent with the indictment. In *Critchley*, the evidence did not show any threat at the critical time, so that there was no extortion. Here there was ample evidence that co-conspirator Amabile threatened Riley with violence to obtain the second draw, and of course Evans is chargeable with his co-conspirator's acts in furtherance of the conspiracy.[5] In *Carbo*, Gibson had legitimate business reasons for his association with the conspirators, whereas Evans' associations with Amabile were clearly for illegal purposes.

Sufficiency of the Evidence as to Battaglia

As noted above, during DiVito's, Pranno's and Amabile's February (or early March) 1965 visit to Battaglia's farm, Battaglia said he liked La-Key and they could use him in other things because he was clean. From this, the jury could infer that Battaglia had embarked "on a criminal venture of indefinite outline" (*United States* v. *Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944)). He was commit-

[5] *United States* v. *Sansone*, 231 F. 2d 887, 892 (2d Cir. 1956), certiorari denied, 351 U.S. 987.

ted to a long term relationship contemplating the use of La Key in numerous ventures. Battaglia admitted knowledge of Evans' paid role. He also acknowledged that he was to receive a $20,000 cut from Riley through the Carlson contract at Lansing. Since Battaglia had a stake in the outcome of the conspiracy, even the stringent test of conspiracy liability evolved by Judge Learned Hand in *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir. 1940), affirmed, 311 U.S. 205, was satisfied. Battaglia was also the arbiter of disputes among the co-conspirators. Being an associate of Anabile in this venture, Battaglia is properly chargeable with knowledge that his confederate, Anabile, would resort to threats if necessary to extract money from Riley. Battaglia had to "take his chances" as to the methods used by the other co-conspirators. *United States* v. *Andolschek*, *supra*. As in *United States* v. *Kahaner*, 317 F.2d 459, 468, note 4 (2d Cir. 1963), certiorari denied, 375 U.S. 835, 836, "there was ample evidence to raise a question for the jury whether he had joined in the conspiracy; if the jury so found, he [a co-conspirator who held the bribe money] was criminally responsible for the acts of the other conspirators and his own failure to perform more than a few overt acts would be immaterial." Evidence of knowledge of the details of the plan or of participation of others is not required. *United States* v. *Hicken*, 360 F.2d 127 (7th Cir. 1966), certiorari denied, 385 U.S. 928.

Intent to Affect or Knowledge of Effect on Interstate Commerce

Battaglia insists that it was necessary to find that he intended to affect or had knowledge that the conspiracy would affect interstate commerce, and that there was insufficient evidence of such intent or knowledge. A similar argument was rejected in *United States* v. *Varlack*, 225

F.2d 665, 672 (2d Cir. 1955). As we recently held in *United States* v. *Pranno*, F.2d (7th Cir. 1967):

> "All that must be proved, however, is that defendants conspired to commit extortion, and that the natural effect of carrying out their threat, whether they were conscious of it or not, would affect commerce."

The District Court charged the jury that "all that is necessary is that the natural effect of the acts committed pursuant to the conspiracy was to effect, delay or obstruct [interstate] commerce," and that the requisite effect on commerce would be found if the jury believed "beyond a reasonable doubt that the defendants' activities as shown by the evidence in any way or degree obstructed, delayed or affected commerce." These instructions were proper under the Hobbs Act. Neither Battaglia nor Evans argues that the extortion would have no effect on interstate commerce. Here, one of the means to accomplish the extortion was the threat otherwise to cause Riley Management Corporation "all sorts of trouble." Many interstate deliveries were being made to its Lansing project. If Amabile's threats to destroy Riley had been carried out, this interstate commerce would necessarily have been obstructed. The Hobbs Act covers such a situation. *United States* v. *Pranno*, *supra*. Furthermore, the Riley company's reserves were depleted by the extortion. Since its business depended, in part, on ability to pay for interstate shipments to the Lansing site, the jury could infer that the extortion would have an effect on interstate commerce. Under the language of this statute (see note 1 *supra*), that is a sufficient nexus with interstate commerce.

Denial of Bill of Particulars

Evans' briefs do not contest the denial of requests Nos. 2 and 3 in his motion for a bill of particulars.[6]

[6] The other three requests were granted and the Government answered them.

However, Battaglia adopted these requests and argues that the District Court erroneously denied them. Specifically, Battaglia asserts that he was entitled to information about the 1962 and 1963 Palermo Anmabile threats to Riley with respect to his Northlake and Westmont, Illinois, projects. However, requests Nos. 2 and 3 provide:

> "2. State the acts or things done by the petitioner [Evans and, by adoption, Battaglia] by which he and the other named and unnamed persons, combined, confederated and agreed together to obstruct, delay and affect commerce as charged.
>
> "3. State the dates, times and places when and where the alleged acts set forth in paragraph 2 above were done or performed."

Even if the District Court had ordered the Government to answer these requests, the Palermo Anmabile threats would not have been revealed. Since Battaglia did not ask for this information below, he may not assert error in this respect. Furthermore, none of the *five* requests in the motion for a bill of particulars covered this subject matter. Therefore, the Government was not required to respond as to it. No abuse of discretion has been shown with respect to the partial denial of this motion. *Wong Tai v. United States*, 273 U.S. 77, 82.

Conspiracy Instruction

During the early portions of the trial, the District Court refused to permit the Government to have the defendants' declarations considered against all of them. Later in the trial, upon motion of the Government, the Court instructed the jury as follows:

> "Before we proceed with the taking of further testimony in this case, I have a direction and instruction to give you, to make to you.

"You will recall during the course of this trial certain testimony was admitted in evidence only as to one or more of the defendants, and you were instructed at that time that such evidence was not then to be considered against any defendant to whom the evidence did not pertain.

"It is now my responsibility under the law, to instruct you that such evidence is admissible against all of the defendants as evidence in connection with the alleged conspiracy charged in the indictment, whether or not each of the defendants was present when the acts or conversations or incidents testified about were done or carried on.

"You may consider then such evidence as pertaining to all of the defendants."

Citing *United States* v. *Pronger*, 287 F.2d 498 (7th Cir. 1961), Battaglia complains that this instruction was a direction to the jury that a conspiracy had been proven and that each defendant was a member of that conspiracy. However, the last paragraph of this instruction referred to "the alleged conspiracy" and did not tell the jury that the Government had proved a conspiracy. A later instruction made it plain that the jury could not consider acts and declarations of one conspirator against the others unless the jury found the existence of a criminal conspiracy and that the acts and declarations were in furtherance of the conspiracy.

The *Pronger* case is not controlling here. The terms of the instruction in that case were dissimilar to those here, and any defect in that instruction was apparently not cured by a later instruction. Conspiracy instructions similar to those here were approved in *United States* v. *Bernard*, 287 F.2d 715, 719-20 (7th Cir. 1961), which reinforces our conclusion that the later instruction made the risk of prejudice too slight to justify reversal. *Pronger*

has been confined to a situation where the erroneous instruction was in effect given as part of the charge and does not apply where, as here, trial time intervened between the ascribed comments and the final, proper charge. *United States* v. *Allegretti*, 340 F.2d 254, 256 (7th Cir. 1964, *en banc*), certiorari denied, 381 U.S. 911.

Battaglia claims that the jury was not told that it could not consider acts or declarations of a co-defendant made outside the presence of a defendant against the absent defendant unless it found that a conspiracy existed and that the acts and declarations were in its furtherance, but an examination of the transcript shows that such an instruction was given.

Admission of Pre-indictment Threats Made by Amabile and Palermo and Admission of Statements of Co-conspirator Pranno

Battaglia also asserts that the District Court erroneously admitted Riley's testimony of 1962-1963 threats by Amabile and Palermo and erroneously admitted Pranno's statements outside the presence of the defendants. We agree with the Government that Palermo-Amabile threats were relevant to show the reasonableness of Riley's fear when confronted with Amabile's demand to authorize the second draw. The District Court carefully instructed the jury that this testimony was limited to that purpose (Tr. 2564).

As to Pranno, the evidence concerning his January 1965 visit to Battaglia's farm, as well as other evidence previously summarized, shows that he was a co-conspirator of Battaglia and Amabile, so that La-Key's and DiVito's testimony concerning Pranno's statements outside the presence of defendants was properly received.

Accomplice Instruction

Battaglia complains that the District Court's accomplice instruction advised the jury that DiVito and La-Key were accomplices. The instruction was as follows:

> "I must tell you, ladies and gentlemen of the jury, that an accomplice is one who unites with another person in the commission of a crime voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the criminal act charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty even though not corroborated or supported by other evidence. However, you should keep in mind that such testimony is to be received with caution and weighed with great care. You should not convict any defendant upon the unsupported testimony of an accomplice unless you believe the unsupported testimony beyond all reasonable doubt."

This instruction does not say or imply that DiVito and La-Key were accomplices. The instruction obviously means that if a person is found to be an accomplice, his testimony should be scrutinized with special care. A similar instruction has been proposed by Judge Mathes for the use of the District Courts. 20 F.R.D. 244. Such cautionary instructions were advocated in *United States* v. *Bucur*, 194 F.2d 297, 305 (7th Cir. 1952); *Wainer* v. *United States*, 82 F.2d 305, 308 (7th Cir. 1936), affirmed, 299 U.S. 92, and *Ruvel* v. *United States*, 12 F.2d 264, 265 (7th Cir. 1926). Battaglia relies on *United States* v. *Balodimas*, 177 F.2d 485, 487 (7th Cir. 1949), but there the district judge termed two named witnesses as accomplices. Here the jury had already been instructed that it was the exclusive fact finder, and there was sufficient evidence from which the jury could find that La-Key and DiVito were accomplices of the defendants. In this setting, the giving of this instruction was not erroneous.

Restriction of Cross-examination and Refusal to Admit Defense Exhibits

Battaglia assails the District Court's rulings restricting the cross-examination of DiVito, La Key and Riley; he also assails the court's refusal to receive certain defense exhibits. A study of the cross-examination of these witnesses shows that the District Court allowed defense counsel considerable latitude.

Battaglia's counsel attempted to show that a tax indictment had been dismissed against DiVito in return for his agreeing to be a government witness in this case. Battaglia's counsel cross-examined DiVito extensively about a "deal" to drop the income tax charge if DiVito testified for the Government in the instant case. Later the First Assistant United States Attorney in Chicago testified that the reasons for the Government's dismissal "were that Mr. DiVito's lawyer served us with that motion showing that he had paid his taxes, attaching the check and the receipt and it was obvious that we had no case * * *." He also testified that the Assistant United States Attorney in charge of the DiVito case was satisfied that proof the tax had been paid in 1964 was a defense to that indictment. If Battaglia's counsel was still not satisfied why the DiVito indictment was dismissed, he could have also called the Assistant United States Attorney in charge of that matter.

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[1] By allowing this testimony, the trial judge acted consistently with the rule that bias or interest of a witness is not a collateral issue, and that extrinsic evidence is admissible thereon. *United States* v. *Lester*, 248 F.2d 329, 334-335 (2d Cir. 1957); 3 Wigmore on Evidence (3rd ed. 1940) §§ 948-950, 1005(b); McCormick on Evidence (1954) § 40, pp. 85-86.

The District Court refused to permit the defense to put into evidence the court file and docket entries relating to DiVito's tax case, but they were merely cumulative and did not reveal any "deal." Hence their exclusion was not prejudicial to Battaglia.

Battaglia endeavored to show that La Key was responsible for the milking of the Carlson Construction and Equipment Company. The defendants were given ample opportunity to examine La Key regarding the balances in the Carlson bank accounts. The District Court did sustain the Government's objection to certain checks. But Battaglia was not prejudiced by this ruling, for the checks were already reflected by ledger sheets that had been received, thus enabling Battaglia's counsel to argue that La Key had looted the Carlson Company for his own personal gain. In addition, the checks were being offered in an attempt to contradict a witness on a collateral matter not relating to the $48,500 allegedly extorted. This is impermissible. *United States* v. *Masino*, 275 F.2d 129, 133 (2d Cir. 1960); *United States* v. *Sweeney*, 262 F.2d 272, 276-277 (3rd Cir. 1959). 3 Wigmore on Evidence (3rd Ed. 1940) § 979. Prior contradiction may be shown only on a matter material to the substantive issues of the trial. *Gordon* v. *United States*, 344 U.S. 414, 420, note 13. As noted there, a trial judge has "wide latitude in control of cross-examination, especially in dealing with collateral evidence as to character." 344 U.S. at p. 423.

Next, Battaglia states that he was precluded from showing Riley's purchase price for the Lansing land. It is true that the real estate contract was not admitted by virtue of the best evidence rule. But earlier Battaglia had shown through Robert Biederman's testimony that the price was about $140,000. Since the disparity between the purchase

price and the price used in loan negotiations was already in the record, no prejudice stemmed from this ruling.

Battaglia complains too that Riley's February 5, 1960, bankruptcy petition should have been admitted. Again, the District Court had broad discretion to refuse it as a collateral matter. *United States v. Bender*, 248 F.2d 869, 874 (7th Cir. 1958), certiorari denied, 349 U.S. 920. Riley's bankruptcy petition supposedly stated that he owned no stocks or bonds as of that date, but this record does not show that the bankruptcy statement was "obviously perjured" as Battaglia claims. No abuse of the District Court's discretion has been shown in this exclusionary ruling.

Battaglia complains that in Amabile's cross-examination of Riley, Amabile was not permitted to show that Riley's October 5, 1965, statement to the Federal Bureau of Investigation did not refer to the 1962-1963 threats of Palermo and Amabile. However, Riley testified that he had advised the FBI of these threats and added: "I have only read two pages [of the October 5 statement] and I see it in there, yes, sir." If Battaglia's counsel considered the point worth pursuing, he could have called FBI agents Dahlman and Kotsos to prove the contrary. *United States v. Borelli*, 336 F.2d 376, 391 (2d Cir. 1964), certiorari denied, 379 U.S. 960.

In his reply brief, Battaglia's counsel contends that the Government should have granted his request for production of DiVito's grand jury testimony.* No particularized need for this testimony was shown, nor was there any showing that the ends of justice required production. Therefore, production was unnecessary. See *Dennis v. United States*, 384 U.S. 855, 868-875.

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* Battaglia's counsel did not request the production of La-Key's and Riley's grand jury testimony.

As to Battaglia's principal cases cited to show reversible error, in *Alford* v. *United States*, 282 U.S. 687, defense counsel was not permitted to establish that a prosecution witness was in government custody and therefore might expect consideration. In this case, the defense was permitted to show that both DiVito and Riley were in government custody. In *Spaeth* v. *United States*, 232 F.2d 776 (6th Cir. 1956) and *United States* v. *Hogan*, 232 F.2d 905 (3rd Cir. 1956), the defense sought to cross-examine government witnesses who stood convicted of a federal offense, in an effort to show that they expected leniency in return for their testimony. The District Court refused to allow such cross-examination. In this case, Battaglia's counsel subjected DiVito to a lengthy cross-examination about the reasons for the dismissal of the tax evasion indictment against him. This also serves to distinguish *United States* v. *Masino*, 275 F.2d 129 (2d Cir. 1960), where such cross-examination of government witnesses was not permitted.

Gordon v. *United States*, 344 U.S. 414, *United States* v. *Beckman*, 155 F.2d 580 (2d Cir. 1946), and *Meeks* v. *United States*, 163 F.2d 598 (9th Cir. 1947) deal with the exclusion of documentary evidence showing that the prosecution witnesses had been punished for violating federal law and were still subject to the jurisdiction of the court or agency which had imposed the punishment. In each case, the information contained in the documentary evidence tended to prove bias and was not otherwise present in the record. In this case, the District Judge remarked at one point: "I assume that the government is the only one who could voluntarily move for the dismissal [of the tax indictment against DiVito]." This statement, coupled with the extensive cross-examination of DiVito and the examination of the First Assistant United States Attorney in Chicago, told the jury that the indictment had been dismissed on

motion of the government. Defendants do not show that any other significant information was contained in the excluded documentary evidence.

Gordon, Masino, and *Meeks* are further distinguishable because in those cases reversal was based on the cumulative prejudicial effect of two or more errors. This case lacks at least one of the errors found in each of those cases.

We approve of the foregoing cases and of the policy of affording the defense wide latitude in showing bias. We do not view the disposition of the issues herein as inconsistent with them.

We have considered Battaglia's other points relating to cross-examination, exclusion of documentary exhibits and instructions and find them to be without merit. In closing this discussion, it should be noted that various criticized evidentiary rulings of the District Court were well within those approved in *United States* v. *Lawinski,* 195 F.2d 1 (7th Cir. 1952). Taken together, the evidentiary rulings here gave these defendants broader latitude than in *Lawinski* and do not amount to an abuse of discretion.

Evans' Character Witnesses

Evans was precluded from showing his good character through four acquaintances. Relying on *Michelson* v. *United States,* 335 U.S. 469, the District Court explained that his evidentiary rulings were based on improperly put questions and on improper foundation. As to some of the questions, this may have been an over-strict application of *Michelson.* However, no foundation was laid to show that these witnesses knew any of the people who lived in the community where Evans resided. Proof of reputation "among a limited group such as fellow employees in a particular building" has been held inadmissible. 335 U.S. at

p. 481, note 17; *Williams* v. *United States,* 168 U.S. 382, 397; *Kroot* v. *United States,* 66 F.2d 449, 451 (7th Cir. 1933). Although a more liberal approach to character witness rulings has precedential basis, we adhere to Mr. Justice Jackson's precept not to "disturb rulings of trial courts" in this troublesome field except in rare instances (335 U.S. at p. 480). (Emphasis added.)

Restriction of Evans' Testimony

Evans argues that the District Court's evidentiary rulings during his testimony denied him an opportunity to present an adequate defense.

It is true that Evans was not permitted to deny certain secrecy admonitions supposedly made about the Lansing project during Riley's June 1964 conversation with Evans, but this was because of the leading and suggestive nature of his trial counsel's questions. To rebut secrecy, Evans' counsel was permitted to elicit that the Riley company had prepared a brochure to promote sales of the Lansing apartments, and that the Hammond *Times* published a story about the project in August 1964.

The rulings not permitting Evans to answer certain questions as to conversations with Amabile, La-Key, DiVito and Pranno were based on the improper form of the questions and lack of proper foundation. These rulings are supportable under rudimentary rules of evidence. Furthermore, Evans was permitted to deny that he met with those persons after his counsel rephrased his questions.

As to the bid sheets, Evans was allowed to testify that there were a signed original and a signed copy of the sewer contract bid sheets, and that the signed original was left in Riley's office, the very points his trial counsel was attempting to elicit.

Since Evans was charged with a January 1965 conspiracy, we cannot state that it was erroneous for the District Judge to consider irrelevant whether Riley held Evans in high esteem in August 1965.

Our study of Evans' testimony shows that he was given great scope in presenting his denials of any part in the conspiracy. The District Court's exclusionary ruling did not jeopardize his defense and were permissible interpretations of the law of evidence.

Evans' Counsel's Inability to Comment on Battaglia's and Amabile's Failure to Testify

Before the defendants presented their witnesses, the District Court instructed their counsel not to refer to the failure of any of the defendants to take the stand. This instruction was of course to protect the Fifth Amendment rights of the two silent defendants, Battaglia and Amabile. The defenses of the three accused were not mutually exclusive. Also, Evans' counsel's closing argument took advantage of Evans' having taken the stand. There was no "showing that real prejudice will result from the defendant's inability to comment" (*United States* v. *Kahn*, 381 F.2d 824, 840 (7th Cir. 1967), certiorari denied, 36 U.S. Law Week 3251), so that severance was not necessitated.

Trial Publicity

Even though defendants successfully objected to sequestering the jury, Battaglia now argues that prejudicial publicity violated his due process rights. In closing argument, his counsel recognized that the trial court repeatedly admonished the jury to ignore news coverage. There is no claim that any jurors read any of the "prejudicial" articles, thus differentiating the case from *Marshall* v.

United States, 360 U.S. 310. In *Janko* v. *United States*, 366 U.S. 716, the second conviction was reversed because the trial court had not inquired whether the jurors had read a St. Louis *Post Dispatch* article published during the trial and containing "inadmissible prejudicial information."[9] Here the jurors were twice asked whether they had seen articles about the case. None admitted having done so. *United States* v. *Accardo*, 298 F.2d 133 (7th Cir. 1962), and *United States* v. *Largo*, 346 F.2d 253, 256 (7th Cir. 1965), certiorari denied, 382 U.S. 904, do not hold that the District Court must always interrogate each juror singly. See *United States* v. *Jannsen*, 339 F.2d 916, 919 920 (7th Cir. 1964).

Battaglia also complains of the presence of a permanent press table inside the bar.[10] The Supreme Court has recently emphatically disapproved of such an installation (*Sheppard* v. *Maxwell*, 384 U.S. 333), so that the District Judges should consider reserving the bar of the court for counsel in the future (384 U.S. at p. 355). However, we do not consider the placement of this press table to constitute reversible error, for this record reveals no "frequent confusion and disruption of the trial" or "constant commotion within the bar" (384 U.S. at p. 355). In our view, the intrusion of the news media into this trial was not so great as to obviate a showing of prejudice (cf. *Estes* v. *Texas*, 381 U.S. 532 and *Sheppard* v. *Maxwell*, 384 U.S. 333). Battaglia has failed to satisfy us that he was denied a free trial because of adverse publicity.

[9] See Solicitor General's Memorandum filed in the Supreme Court in the *Janko* case.

[10] Such tables have been installed in the various trial courtrooms in the Northern District of Illinois.

Eavesdropping

The Government's brief reprints an August 18, 1967, letter from the Assistant Attorney General in charge of the Criminal Division of the Department of Justice to the United States Attorney in Chicago. The letter confirms the Department's pre trial advice to the United States Attorney that there was no electronic monitoring in this case. Cf. *Hoffa* v. *United States*, 387 U.S. 231. Accordingly, it is now academic whether the District Court should have granted a hearing to determine whether electronic eavesdropping had taken place.

No prejudicial error having been shown, the two judgments are affirmed.

Nos. 16312 and 16313

SWYGERT, *Circuit Judge*, dissenting. This dissent is based on two independent grounds. First, I do not believe that the Government introduced evidence sufficient to convict Battaglia and Evans of the crime charged against them. Second, although my views on the sufficiency of the evidence would dictate a reversal without remand, a multitude of prejudicial errors occurred which in combination, if not singly, precluded the defendants from receiving a fair trial. Consequently, on the basis of these trial errors, the case should be remanded for a new trial regardless of the insufficiency of the evidence.

I.

SUFFICIENCY OF THE EVIDENCE.

Accepting the evidence in the light most favorable to the Government, the evidence unquestionably showed that Amabile, Pranno, DiVito, Evans, and LaKey devised and executed a scheme to defraud the Riley Management Cor-

poration by using the Carlson Construction & Equipment Company as a facade so that moneys meant for construction purposes could be diverted to those participating in the scheme. But this scheme was not the one charged in the indictment. The evidence also unquestionably showed that Amabile threatened Riley for the purpose of obtaining money. The record is barren, however, of any evidence, direct or circumstantial, to sustain the charge that Battaglia and Evans conspired with Amabile "to obstruct, delay and affect commerce" in the movement of materials for the construction of the Riley dwelling units by means of extortion.

In early 1964, the Riley Management Corporation began planning the construction of an apartment building at Lansing, Illinois. In June of that year, William Riley, president of the Riley company, requested his construction superintendent, Dave Evans, to start lining up contractors for the Lansing project, but asked Evans to keep the project "secret from Joe Shine [Amabile] and Nick Palermo." A few days later Riley, at Amabile's request, met Amabile and Palermo at the latter's Melrose Park plumbing company office. Riley testified concerning this meeting:

> Nick Palermo asked me if I was going to build a project in Lansing, Illinois. I told Mr. Palermo that I was and Mr. Palermo asked me when he was going to get the blueprints so that he could figure the work. I told Mr. Palermo that I did not plan on giving him the work. I told Mr. Palermo that he was behind on his existing projects and with the efficiency that we are now enjoying, it was ridiculous to give him this project.
>
> Joe Shine told me that I wasn't going to give it to anyone else other than them and they asked me basically what the hell I was trying to pull. . . .
>
> • • •

> Joe Shine told me that if I didn't give them the work in Lansing, that he would stop the project in Northlake and in Westmont, Illinois. They told me that I had to use them, that if I didn't use them, that they would put me out of business. I told Nick and Joe that they were now in the process of putting me out of business, the way they were doing it. I was told not to be a smart punk.
>
> Joe Shine told me I shouldn't be a wise guy. Joe Shine told me he knew how to handle wise guys and that I would be walking the streets with a candy cane.
>
> * * *
>
> Joe Shine told me he knew where my mother lived. He would — he told me that he knew where my kids went to school and they had a baseball bat to handle wise guys like me.

After this meeting, Riley gave Palermo the plumbing contract for the Lansing project.

In late July or early August 1964, Amabile met Mike DiVito, a sewer contractor, and Rocco Pranno in the latter's D'Or Supper Club in Stone Park, Illinois. Upon learning from Amabile about the Riley project in Lansing, DiVito asked if he could obtain some of the sewer work. Amabile said "it was possible," but that he didn't want DiVito's name on the contract. A few days later Amabile told DiVito and Pranno that if they came up with "a good clean fellow," they could get the sewer contract for the Lansing project. Shortly after this conversation, DiVito and Pranno persuaded Henry LaKey (who had been a foreman on sewer construction jobs) to work for them if they succeeded in getting the Lansing contract.

In mid-September, DiVito, Pranno, Evans, and Amabile met in the latter's apartment in Northlake, Illinois. Pranno told Amabile that he and DiVito "had a fellow to do

the work for us called Hank LaKey and that he was clean." Amabile replied, "Okay, that's fine . . . [but] before I give you this job, I want $20,000 in cash."

During this period, DiVito and Pranno hired LaKey to work for them for $200 per week plus a ten per cent bonus upon completion of the job. They told LaKey they were starting a "new corporation" to be called the Carlson Construction & Equipment Corporation and they would like to have him put "on the paper as president" of the company. In contemplation of giving the sewer work to DiVito and Pranno, Evans apparently drafted a written contract to be signed by Carlson Construction. The contract that Evans originally drew up, however, was unsatisfactory to DiVito and Pranno because they had decided, after looking over the plans, that there would be insufficient proceeds from the job to pay Amabile the twenty thousand dollars he had demanded "off the top." At this point, Amabile told Evans to figure a way to get more money out of the job. Evans rewrote the contract raising the price approximately forty to forty-five thousand dollars. After looking at the plans and specifications and seeing the high price of the job pursuant to the rewritten contract, DiVito informed Pranno that "there would be $20,000 in cash above our costs and profits." Pranno then told Amabile in the presence of DiVito and Evans that he would give him the twenty thousand dollars. Amabile replied "Okay, it's a deal." In accordance with their previous discussion, Pranno, DiVito, and LaKey formed the Carlson Construction & Equipment Company. DiVito and Pranno each received forty-five per cent of the stock and LaKey the remaining ten per cent.

Sometime in September, Riley asked Evans whether he had lined up a sewer contractor. Evans said that he had obtained an excellent contractor, Carlson Construction.

operated by a man named LaKey. Evans told Riley that he "had looked into Carlson Construction's reputation, it was excellent, and . . . [he] felt quite confident that this man could do a good job." Carlson Construction was given the contract under an arrangement whereby Lawn Savings & Loan Association was to pay Carlson upon receipt of payment slips issued by the Riley Company. Carlson Construction commenced the sewer work in September or October, 1964.

Early in November, Amabile instructed LaKey to get the necessary papers ready for making the first "draw." After preparing the papers, LaKey went to see Amabile at the El Morocco, a night club operated by Amabile in Northlake, Illinois. LaKey testified: "Joe Shine [Amabile] asked me how much the draw was for. I told him $57,000. . . . Joe Shine said he would get a hold of Dave Evans and straighten this out." Within a day or two, LaKey and Amabile went to see Evans, who was a patient in Illinois Masonic Hospital. Before they saw Evans, Amabile told LaKey that Evans was going to receive $5,000 as his cut, not $7,500 as originally planned. At the meeting, Amabile gave Evans a "wad of bills." Evans then looked over the papers for the first draw and crossed out a number of items. After the papers had been retyped, reflecting a reduction of $10,000 in the draw, Evans approved the papers and told LaKey to take them to Riley's office. On November 12, LaKey received a check for $47,517.97 from Lawn Savings & Loan Association based on a pay-out slip approved by Sol Meltzer, Riley's comptroller. LaKey deposited $39,000 in the Carlson Construction payroll account. Of the remaining $8,517, LaKey retained $517 and gave Pranno $8,000. Three days later, at Amabile's direction, LaKey withdrew $20,000 in cash from the Carlson Construction account which he gave to Amabile.

In January 1965, Amabile told LaKey to prepare the papers for a second draw. LaKey got the papers ready and showed them to Amabile who asked how much the draw was for. LaKey replied, "$60,000." Amabile thought that this figure was too high, saying, "I don't want that kind of money taken out of the account at this time. . . . I will tell you what to draw." He also said that he would straighten it out with Evans. That same day, Evans reduced the figure to $48,000 and, after approving the papers, told LaKey to present them to Meltzer for the payment slip. When LaKey presented the papers covering the second draw for approval, Meltzer refused to authorize the request.

LaKey immediately went to see Amabile, relating in Evans' presence what had happened. At Amabile's instruction, Evans and LaKey went to see Riley the next day. Pursuant to Evans' request, however, they entered the office separately. When LaKey told Riley that he was there to get the second draw, Riley replied that Carlson Construction's bills were not being paid, and that he would authorize a payment only when LaKey had satisfied these obligations. During the conversation, LaKey told Riley that the cost of the job had gone up from $120,000 to $200,000. When Riley asked Evans to explain why the price had been increased, Evans told Riley, "There's complications set in on the job and we had to raise the price up to get the job done."

LaKey reported to Amabile that Riley had refused to authorize the second draw. Amabile replied: "You be here tomorrow morning. I'll personally go with you to the office myself. I'll get this straightened out once and for all." The next morning LaKey and Amabile arrived at Riley's office and walked in unannounced. Amabile asked Riley why he did not pay LaKey. Riley said he

couldn't authorize the draw until LaKey had paid his bills. Amabile then told Riley: "I don't care nothing about that. The man's got his money coming, Bill, I want you to pay his money." At that point, Amabile and Riley went to the back of the office and commenced a conversation during which LaKey "seen a lot of arms moving by Joe Shine," who was doing most of the talking. Then Amabile walked towards LaKey, gave him a wink, laughed, and said, "You'll get your money now." Before leaving, Amabile turned to Riley and said: "Don't forget, Bill, I want you to pay this man. I want you to pay him now. You know what I mean." On the way back to the El Morocco, LaKey asked Amabile how he was able to tell "a big man like Riley" what to do. Amabile put up his fist and said, "I got this son of a bitch right here, . . . He's afraid of me."

On the witness stand, Riley gave this version of the meeting:

> Mr. Shine told me that I had to pay this man, that this man was a friend of theirs; that I was expected to pay them; that if I didn't pay them all sorts of people would get mad.
>
> I told Joe that it would be foolish for me to make this payment; that they were just pushing this company to ruination; that it just was absolutely ridiculous to pay this man and that I did not want to pay him.
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> • • •
>
> Mr. Shine told me that I had no choice on this matter; that I had to pay this man; that the man wanted him paid.
>
> I told him that this was silly. I had a big loan pending with Equitable Life and this thing would, it could destroy everything that we were trying to build

> up. I told him that, in fact I begged him not to have to pay him. He told me that I had to pay him.
>
> * * *
>
> He told me the man said I had to pay him and he told me if I didn't pay him there would be all sorts of trouble, and there was no sense in me making this trouble for myself so I better pay him because he was a friend of theirs.

Riley further testified that he subsequently authorized the payment because he was afraid; that he had been subjected to previous threats of physical harm to his family and his employees and ruination of his company by Amabile and Nick Palermo. Shortly after this meeting, LaKey deposited a $48,512.48 check, received from Meltzer, in the Carlson Construction bank account. Later Amabile told LaKey to withdraw $17,000 from the account. Of this amount, Amabile gave LaKey $5,000; LaKey in turn gave Evans $1,000.

A close analysis of the evidence in this case is essential to determine whether the Government proved the crime charged. The precise charge was a conspiracy to extort money from Riley. The gist of the crime of conspiracy is an agreement between two or more people, rather than the resultant action undertaken pursuant to the agreement. Since the agreement is the gist of the crime, the agreement itself must be proved either by direct or circumstantial evidence. If circumstantial, the circumstances must be such as to warrant the jury in finding that the alleged conspirators had "some unity of purpose, some common design and undertaking, some meeting of minds in an unlawful arrangement. . . ." *Shannabarger v. United States*, 99 F.2d 957, 961 (8th Cir. 1938).

The conspiracy charged in this case was allegedly aimed at obstructing and delaying the interstate movement of

materials and supplies required for Riley's Lansing project. That obstruction and delay was to result from the extortion of $48,500 from the Riley Management Corporation by engendering fear of bodily and economic injury in William Riley.

There is a substantial question concerning the admissibility of many statements testified to by DiVito, LaKey, and Riley, which were neither relevant to the crime charged nor binding on absent alleged coconspirators. Assuming for the sake of argument, however, that all their testimony was relevant and admissible, I still do not believe that the evidence shows either that Evans agreed with Amabile and Pranno or that Battaglia agreed with Amabile and Pranno to commit the extortion charged in the indictment.[2]

The evidence with regard to Evans shows that the only agreement or "common design and undertaking" to which he was party was one to bilk the Riley company by means of fraud and deceit out of money earmarked for the Lansing job. Consistent with a scheme to defraud, DiVito and Pranno kept in the background, Amabile expressly ordering DiVito to stay off the job. A "good, clean fellow," LaKey, was recruited to act through the facade of Carlson Construction. There was constant effort among the conspirators to make sure that Riley was kept in the dark about Amabile's connection with Carlson Construction. Both draws were misrepresented to Riley as being legitimate expenditures. All these facts, as well as many others in the record, are indicia of fraud rather than extortion. Fraud is marked by misrepresentation, deception, and deceit. Extortion is direct and brutal — the very antithesis of fraud.

[2] There was no proof that Evans and Battaglia had any connection with each other except through common acquaintance with Amabile, DiVito, Pranno, and LaKey.

The Government argues that the most conclusive direct evidence showing Evans to be a "willing participant" in the conspiracy is a statement made by him to LaKey when LaKey expressed anxiety about paying his bills. Evans said: "I will talk to Joe Shine and Joe Shine will talk to the man. . . . We will see that the money is in the bank for you." (This statement was made in January 1965, after the first draw and after Amabile had gotten his $20,000 "off the top.") Subsequent to Evans' statement, arrangements were undertaken for the second draw. Again attempts were made to deceive Riley. Evans decreased the amount of the draw prepared by LaKey. When LaKey failed to get the draw approved, Evans accompanied LaKey to Riley's office, but by prearrangement they entered the office separately. Evans told Riley on this occasion "there's complications set in on the job and we had to raise the price up to get the job done."

The foregoing facts, all involving conduct by Evans occurring after his statement relied on so heavily by the Government, suggest only deceptive conduct on his part, rather than complicity in a scheme to extort. Moreover, these same facts highlight the individual action of Amabile in resorting to extortion. When Amabile realized that the subterfuge was no longer working as it had in the past, he decided to take things in his own hands, and, unknown to the others, unmask the fraud and threaten Riley in order to get an approval of the second draw.[3]

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[3] This use of the phrase "the man," like some of its other uses. (*See infra* notes 5-7 and accompanying text) fails to identify the person being referred to. The majority recognizes that in this instance the phrase could refer to either Battaglia or Riley. Yet they conclude by implication that Evans was referring to Riley, stating, "The jury could properly infer that Evans knew Amabile

The Government also argues that the creation of Carlson Construction merely "put a velvet glove on the iron fist with which Amabile and 'The Man' had terrorized Riley in the past." Although past extortion of Riley had been used to obtain contracts, the Government contends that in the present situation, Amabile, with Evans' cooperation, did not have to resort to force to obtain the sewer contract; instead Amabile could wait and exert his pressure to obtain the money obligated by the contract.

In fact, however, this argument reveals the clear import of the evidence in this case—that a fraudulent scheme was practiced on Riley. When Riley flatly refused to approve the second draw even though Evans had tried to persuade him in the other direction by making a bald misrepresentation, Amabile unilaterally, and perhaps spontaneously, reverted to his more accustomed role, that of an extortionist. This unilateral action on the part of Amabile cannot be transformed into a prior agreement with Evans and Battaglia to extort as the Government charged in the indictment.'

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would induce Riley—through fear—to authorize the second draw." If he was instead referring to Battaglia, the most damaging aspect of the Government's case against Evans is neutralized. Because the phrase "the man" is so indefinite and ambiguous, only speculation and surmise could supply the purport of a reference to Battaglia. But the same speculation and surmise is necessary to support the majority's rationale that the statement reflected Evans' awareness that Amabile was going to exercise extortion on Riley.

'The record indicates that prior to the second draw Evans told LaKey that the only contracts Evans would "let out here [Lansing] are the ones Joe-Shine tells me." Evans' deep involvement with Amabile is further indicated by a statement Evans made to LaKey after the second draw when he said: "I can't get out. I am too

The slender reed on which the Government depends to demonstrate an agreement to extort between Amabile and Evans is not even present with respect to Battaglia. The evidence touching upon Battaglia's connection with the crime charged may be summarized as follows. Riley testified that although he had never met Battaglia, he had seen him once in early 1984 in Amabile's night club. DiVito testified that he saw Battaglia talk to Amabile in October of that year in Amabile's club. LaKey testified that in late November or early December, he was with Amabile at Battaglia's farm in Pingree Grove, Illinois, where he was introduced as "Hank LaKey running the job for them in Lansing, Illinois." While there, he heard Battaglia ask Amabile why Evans was "getting that kind of money." Amabile replied: "I made a deal with the man. The man got us the job. . . . I promised him $7,500,

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deep with Joe Shine. I know too much about the other people." The day before this conversation, LaKey had been called back from Florida to a meeting attended by Amabile and Evans. LaKey described what took place:

> I got in a conversation with Joe Shine first as soon as I got in the Club, he hollered and told me, he said, "You're not paying the bills, you're not taking care of the job. You got me in trouble with Riley. Riley's in trouble. You're making Dave Evans lose his job. You're taking my man right out of Riley's. I don't know what is going on. You are causing nothing but trouble."

In sum, although this testimony confirms Evans' association with Amabile, it just as strongly suggests that their association was in furtherance of a scheme to defraud. At the time of the meeting testified to by LaKey, Evans was unaware that Amabile had committed extortion upon Riley to obtain the second draw. The only inference that can properly be drawn from LaKey's testimony, therefore, was that Amabile was attempting to keep the ruse going by conveying the impression to Evans that the scheme to defraud was still in operation.

I'll take care of it." DiVito testified that in February or March 1965, he went with Pranno to Battaglia's farm. Amabile came a few minutes later and the three of them awaited Battaglia's arrival. According to DiVito, Pranno said in Amabile's and Battaglia's presence, "You know about this Riley deal in Lansing where we got Hank LaKey to set up the company and do the work for us and figure $20,000 in for you?" Battaglia nodded. Pranno and Amabile then argued whether Amabile had taken LaKey away from Pranno. Battaglia intercepted by saying: "Cut it out, you fellows. Keep it down." DiVito further testified:

> Then Jim Pranno continued to talk and he says, "You know we had to borrow $5,000 to keep this job in Lansing going and now I can't find LaKey, and you know there was $20,000 in this deal for you." Mr. Battaglia nodded, says "Yes." And then Jim Pranno continued and says, "I want to know what Joe Shine is doing to me. I want you to tell Joe Shine to get that $5,000 from LaKey so that we can pay back this loan," and Jim Pranno continued on to say that Hank LaKey was a no good s.o.b. Then Mr. Battaglia says, "Well, I don't think Hank LaKey is such a bad guy, I like him, I like to work with him," that they had other things coming up, and that they could use him again because he was clean. And after a minute or so, a pause of about a minute, then Mr. Battaglia got up out of his chair and said, "Rocky, I'll see what I can do for you."

On this record there is absent any evidence, direct or circumstantial, demonstrating that Battaglia knew that money was to be extorted from Riley or that threats were to be made to Riley by Amabile. Nor is there any evidence that Riley feared Battaglia or that Battaglia received any of the money extorted from Riley. Finally, there is no evidence that Battaglia agreed with Amabile, Pranno, or

Evans to commit the crime charged against them. Yet the Government argues in its brief:

> Just as Evans acted at Amabile's direction, Amabile worked at the direction of the defendant Battaglia. Amabile was the muscle while Battaglia was the brains, setting policy and settling disputes. His veil of secrecy was his supposed anonymity, known to a few as "The Man." When one wanted to see "The Man," one went to "The Farm."
>
> From the foregoing evidence a jury could infer that Battaglia had a real interest in the outcome of the Lansing project, that he was participating financially in Carlson Construction's contract and that all other co-conspirators acted at his direction, directly as with Amabile, or indirectly, as with Evans.
>
> From his own mouth Battaglia admitted knowledge of Evans' role and that Evans was being paid. Battaglia knew of La Key's role and that Carlson Construction had the contract on the Lansing project. He knew that La Key was being used as a front, because "he was clean." With Battaglia's knowledge of the foregoing, the jury could conclude that he was a participant in the conspiracy to place Riley in such a position that when Riley learned that Carlson Construction was in fact Amabile and Battaglia, he would authorize payment of the money in the escrow account, not because of the contract, but because he feared Amabile and "The Man."

These inferences which the Government seeks to draw, some of them non sequiturs, can rise no higher than speculation and surmise.

Much of the Government's case against Battaglia rests on identifying him as "The Man." But of the numerous instances of the use of that phrase in the record, many

refer not to Battaglia, but rather to LaKey,[5] Evans,[6] and Amabile.[7] Battaglia's financial stake in the alleged conspiracy to extort is demonstrated, according to the Government, by his two nods and saying "Yes" at the mention of "$20,000 in for you." Although Battaglia's responses to the mention of the money indicate that he was not a stranger to the Lansing venture, they are in no way probative of his complicity in a conspiracy to extort. The force of the Government's argument in this regard is largely diminished by the fact that "the Brains" [Battaglia], who was supposedly "setting policy," had to be reminded twice by Pranno that he had money coming to him.

Reliance is placed by the majority on two Second Circuit cases, *United States* v. *Andolschek*, 142 F.2d 503 (2d Cir. 1944), and *United States* v. *Falcone*, 109 F.2d 579 (2d Cir.), *aff'd*, 311 U.S. 205 (1940). *Andolschek* is cited in support of the proposition that "Battaglia had 'embarked on a criminal venture of indefinite outline' " and therefore, "had to 'take his chances' as to the methods used by the other co-conspirators." The full text of the passage, however, is more illuminating:

> It is true that a party to a conspiracy need not know the identity, or even the number, of his confederates; when he embarks upon a criminal venture of indefinite

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[5] When Amabile went to see Riley concerning the second draw, Amabile said, "*The man's* got his money coming, Bill, I want you to pay his money." (Emphasis added.)

[6] When LaKey and Amabile were going to visit Evans in the hospital, LaKey said, "Joe, the deal was for $7,500 for *the man*." (Emphasis added.)

[7] When Riley first met Amabile and Palermo in April 1962, Riley testified, "Mr. Shine who I had just met struck his face in my face and told me he was *the man* in Northlake." (Emphasis added.)

> outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. *Nevertheless, he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them.* *United States* v. *Andolschek*, *supra* at 397. (Emphasis added.)

And despite the majority's assertion that the "stringent test of conspiracy liability" set forth in *Falcone* was met by the Government here, that case condemned guilt by mere associating.

> There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. *United States* v. *Falcone*, *supra* at 581.

There can be no doubt that Amabile and Battaglia associated together, but, as the court stated in *Falcone*, mere association is insufficient evidence of guilt to support a conviction.

II.

Trial Errors

In urging reversal, Battaglia and Evans point to a number of trial errors which they claim not only unduly

prejudiced them, but also prevented them from receiving a fair trial. Contrary to the majority's disposition of these contentions, I believe that such errors did occur.

Because of my views on the sufficiency of the evidence, however, I do not believe that an extended discussion of the trial errors is either necessary or appropriate. I only refer to them as they reflect upon the conduct of this trial as a whole, the most striking aspect of which was the unfavorable climate in which the proceedings were conducted. Perhaps no single error occurring outside that climate would be sufficient to require a reversal; however, their cumulative effect, as exemplified by the three errors that will be discussed in detail, leads inevitably to the conclusion that the defendants were denied a fair trial.

A. *Pre-conspiracy Threats*

The indictment charged that a conspiracy among the defendants to violate the Hobbs Act began "in or about July, 1964." Yet, William Riley, the victim of the alleged extortion, was permitted to testify over objection about threats made to him in 1962 and 1963 by defendant Amabile and Nick Palermo. These threats related to Riley's proposed building project in Northlake, Illinois and the subsequent payment of $30,000 to Amabile. Riley also testified about threats made by Amabile and Palermo in 1963 in regard to plumbing work at a Riley building project in Westmont, Illinois. Palermo on that occasion said he "would bury Hubley," Riley's construction superintendent, and Amabile said he "would hammer the nails on the coffin." Amabile made other threats to Riley at that time. Purportedly, this testimony was admitted for the purpose of showing the basis of Riley's fear of Amabile in January, 1965. There was ample testimony by Riley, however, of threats made by Amabile after the commencement date of the alleged conspiracy.

According to the majority, the testimony of these threats was "relevant to show the reasonableness of Riley's fear when confronted with Amabile's demand to authorize the second draw. The District Court carefully instructed the jury that his testimony was limited to that purpose." Although I agree that proof of the reasonableness of an extortion victim's fear by testimony of prior threats is generally permissible, the testimony of threats made by Palermo, who was not even charged as an unindicted coconspirator, was irrelevant for any purpose. Moreover, I am at a loss to find the "careful instruction" referred to by the majority. Because the testimony of threats by Palermo was both irrelevant and inflammatory, the defendants were prejudiced by the district court's failure to instruct the jury to disregard that testimony. *Cf. United States* v. *Critchley*, 353 F.2d. 358 (3rd Cir. 1965).

B. *The Accomplice Instruction*

The accomplice instruction was improper because the district judge, in his definition of an accomplice, for all practical purposes told the jury that the crime charged had in fact been committed. In so doing, he invaded the province of the jury. This kind of an instruction would be proper in a prosecution where the alleged accomplice admitted his participation in a concealed criminal offense. In that situation, an instruction like the one given here correctly delineates the weight to be accorded the testimony of the accomplice as that testimony tends to implicate others in the crime that has been committed. In the instant case, however, the crucial question was not who the participants of a concealed crime were, but whether a conspiracy to violate the Hobbs Act, the crime charged, had been formed by the alleged conspirators.

Because the instruction did not explicitly leave open the question whether any of the witnesses were accomplices, the jury may reasonably have interpreted the instruction as a direction from the judge that the crime charged had been proved. To avoid this substantial risk of prejudice, the instruction should have been framed so that the jurors were unequivocally informed that they were the sole judges of whether any witness was *in* fact an accomplice. Such modification would have cured the instruction's vice — the implied assumption that the alleged conspiracy was a proven fact. *See Gordan* v. *United States*, 353 F.2d 9 (5th Cir. 1965).

C. *Evans' Character Witnesses*

Evans sought to elicit testimony of his good character through four witnesses. Conceding the somewhat inept manner in which this undertaking was attempted by Evans' counsel, the district judge's treatment of these efforts was nevertheless unduly restrictive. Throughout the course of defense counsel's efforts to question the character witnesses, Government counsel interposed objections to all questions directed to an assessment of Evans' general reputation as an honest, truthful, and law-abiding citizen. On almost every occasion, these objections were indiscriminately advanced by the simple statement, "I object." With equal regularity, the judge sustained the objections, only rarely intimating the reasons for this action.

At one point, Evans' counsel, obviously frustrated and bewildered, asked the judge to elaborate on his prior statement that "the question is improperly put." In response, the judge should have either demanded that Government counsel frame his objections in more concrete and specific terms or sustained the objections in a man-

ner to convey to defense counsel the reason for his rulings. His failure to do so worked an unnecessary and prejudicial hardship on Evans' counsel's efforts to elicit character testimony from his witnesses.

In addition, some of the court's rulings sustaining the Government's objections were erroneous. On more than one occasion, a foundation was laid to qualify the witness, and the question posed to the witness was properly phrased. The apparent basis for the rulings sustaining the Government's objections to these particular questions was that the testimony sought related to Evans' reputation in the business community rather than his reputation in the community where he lived. The majority relied on this distinction, stating, "[N]o foundation was laid to show that these witnesses knew any of the people who lived in the community where Evans resided."

Reputation in the business community, however, is no less probative than reputation in the residential community to show the absence or pressure of certain character traits in an accused. In this regard, Professor McCormick's observation is apposite:

> The reputation is usually said to be limited to that which obtained in the community where the accused lived, but this should be extended to embrace any considerable group with whom he constantly associated in his business, work, or other continued activity, and who might reasonably be thought to have a collective opinion about him. C. McCormick, Handbook of the Law of Evidence § 158, at 335 (1954).

See also Whiting v. *United States*, 296 F.2d 512, 517 (1st Cir. 1961). Because the crime charged against Evans had a business setting, the most probative character evidence was kept from the jury by the court's rulings. These rulings were erroneous. They were also prejudicial.

For as the Supreme Court said in *Michelson v. United States*, 335 U.S. 469, 476 (1948), "This privilege [of presenting character testimony] is sometimes valuable to a defendant for . . . such testimony alone, . . . may be enough to raise a reasonable doubt of guilt. . . ."

III

Instead of the traditional presumption of innocence with which criminal defendants are ordinarily clothed, the record in this case suggests that a presumption of criminality attached to the acts of these defendants because of their infamous reputations and notoriety. The defendants may have been guilty of nefarious conduct for which they deserve imprisonment, or they may have had such bad reputations as to be considered menaces to society. Such facts alone, however, cannot warrant a blinding of eyes, permitting a conviction to stand that is based on surmise rather than evidence. This kind of difficulty is present in this case because the charge on which the defendants were convicted and imprisoned, an agreement to extort money, was not sustained by the evidence. No person should be punished under our criminal laws unless he has been proved guilty of a specific offense by competent evidence in a fair trial. Due process of law demands nothing less.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1970 — SEPTEMBER SESSION, 1970

No. 17774
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
v.
SALVATORE BATTAGLIA, *Defendant-Appellant.*
No. 17784
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
v.
JOSEPH AMABILE, *Defendant-Appellant.*
No. 17793
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
v.
DAVE EVANS, *Defendant-Appellant.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

October 2, 1970

Before SWYGERT, *Chief Judge,* DUFFY, *Senior Circuit Judge,* and CUMMINGS, *Circuit Judge.*

CUMMINGS, *Circuit Judge.* Defendants' convictions of violation of the Hobbs Act (18 U.S.C. § 1951) were previously affirmed by this Court. 394 F.2d 304; 395 F.2d 47. Subsequently, the Supreme Court remanded these cases to

the district court "for further proceedings in conformity with *Alderman* v. *United States*," 394 U.S. 165, so that the district court could determine, after an appropriate hearing, whether the convictions were tainted by the use of illegally obtained electronic surveillance.

Upon the remand to the district court, the Government turned over to Battaglia's counsel the overhearings involving Battaglia. The Assistant United States Attorney advised the district court that there were no overhearings of defendants Evans or Amabile.

At the hearing before the district court, a special agent of the Federal Bureau of Investigation identified three exhibits as excerpts from logs containing overheard Battaglia conversations that occurred when he visited a Chicago tailoring shop being monitored for other persons' conversations. These were examined by the district court and had previously been examined by us. 394 F.2d 327. The Government withdrew its formal offer to introduce these excerpts into evidence at the hearing after defendant Battaglia objected that proper foundation was lacking. Thereafter, on cross-examination by Battaglia's counsel, the agent explained that his duty was to check the records maintained by the Chicago office of the FBI to determine whether or not an individual had been overheard. He stated that these were the only records in his office of electronic surveillance of Battaglia. The agent also testified that his review of index cards indicating the names of the individuals overheard reinforced his conclusion that there were no other overhearings involving Battaglia. Similarly, he found no records of Airtels involving Battaglia.[1]

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[1] Airtels are brief summaries of the information contained in logs of recorded conversations and are sent to FBI offices not having possession of the actual logs. See *United States* v. *Hoffa*, ... F.2d ..... (7th Cir. 1970).

At the conclusion of the hearing, the district court found that Battaglia had failed to demonstrate that the overheard conversations "were relevant to, material to, or tainted in any way, the evidence presented at his trial," and that his conviction was not tainted by unlawful electronic surveillance. Therefore, a new judgment was entered against him, with the 15-year sentence and $10,000 fine reimposed. Likewise, the district court reimposed the same penalties upon defendants Amabile and Evans as had previously been set aside by the Supreme Court pending the outcome of the taint hearings.

I

Defendant Battaglia first attacks the correctness and adequacy of the proceedings of the taint hearing.[2] He also contends that the Government was obliged to turn over the index cards.

After the Government turned over to Battaglia's counsel the records of the overheard conversations, *Alderman v. United States*, 394 U.S. 165, 183, then required Battaglia to "go forward with specific evidence demonstrating taint." Only after Battaglia had shown a ground for finding taint would the Government face the ultimate burden of showing the evidence was untainted. 394 U.S. at p. 183. These strictures were followed by the court below. Instead of attempting to show possible sources of taint, however, defendant's counsel successfully objected to the transcripts of the conversations being received in evidence. Indeed, he has made no attempt to show that they tainted his conviction, apparently agreeing with our prior determination that they were "utterly irrelevant to these convictions." 394 F.2d at p. 328.

[2] Defendant Evans adopted generally the points raised in the briefs of his codefendants, apparently including Battaglia's objections to the taint hearing. However, no contention has been made by either defendant Evans or Amabile as to defects in the hearing procedure.

In *Alderman*, the Court observed that a defendant does not "have an unlimited license to rummage in the files of the Department of Justice." 394 U.S. at p. 185. There has been no showing that the index cards were essential to show taint. Accordingly, we hold that the district court did not abuse its discretion in denying their production and that the hearing satisfied *Alderman*.

II

All three defendants also seek the opportunity to present numerous additional errors relating to their convictions. Although we will not reconsider issues already decided against defendants in their previous appeals (*United States* v. *Hoffa*, ... F.2d ..... (7th Cir. 1970), we will dispose of five assertedly new points now raised.

First, the defendants claim that the district court was required to permit them to learn the current residence of government witness Riley under *Smith* v. *Illinois*, 390 U.S. 129.[3] However, the record shows that Riley was fearful of physical harm to himself and to his family, so that the trial court properly refused to allow disclosure of Riley's last address. *United States* v. *Varelli*, 407 F.2d 735, 750 (7th Cir. 1969); see also *United States* v. *Palermo*, 410 F.2d 468, 472 (7th Cir. 1969). In addition, defendants had already been permitted to establish that Riley had reason to cooperate with the Government, so that it became unnecessary to show that he was in protective custody.[4] Cf. *United States* v. *Daddano*, ... F.2d ....., ... (7th Cir., 1970).

[3] This point was also raised without avail in the petitions for rehearing *en banc* to review our prior opinion reported in 394 F.2d 304.

[4] Defense counsel knew that Riley was in protective custody (App. 41) and told the jury he would show this (Tr. 19 in *United States* v. *Amabile, et al.*, No. 67 CR 85 (ND Ill. 1967)). Amabile's

Battaglia further asserts that prejudicial publicity requires reversal of the convictions in light of the ruling in the related case of *United States* v. *Palermo*, 410 F.2d 468 (7th Cir. 1969). In that case, however, the trial judge made no inquiry of the jury as to whether any of them had read prejudicial newspaper items. Here a collective inquiry was twice made of the jury in accordance with *Margoles* v. *United States*, 407 F.2d 727, 734-735 (7th Cir. 1969), certiorari denied, 396 U.S. 833, and *United States* v. *Rizzo*, 409 F.2d 400, 402 (7th Cir. 1969), certiorari denied, 396 U.S. 911. Since none admitted contact with prejudicial publicity, it was unnecessary for the district judge to poll each juror separately. *United States* v. *Solomon*, 422 F.2d 1110, 1116-1117 (7th Cir. 1970) certiorari denied *sub nom. Sommer* v. *United States*, 399 U.S. 911; *United States* v. *Daddano*, ... F.2d ..... (7th Cir. 1970).

Battaglia argues that the indictment is duplicitous because it charges both a conspiracy and a substantive offense. In this case, the indictment was not duplicitous, for "the allegation of acts which would amount to commission of the substantive offense was merely descriptive of the conspiracy." *Reno* v. *United States*, 317 F.2d 499, 502 (5th Cir. 1963), certiorari denied, 375 U.S. 828.

Battaglia also asserts that the indictment was unconstitutional because it charged a 1964 conspiracy and was "amended and distorted" by permitting proof of a conspiracy beginning in 1962. As pointed out in our prior opinion, that evidence was "relevant to show the reason-

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counsel had shown that Di Vito was in protective custody (Tr. 227-234). Battaglia's counsel may have decided not to pursue this same line of questioning with Riley (not blocked by the trial judge's refusal to permit disclosure of Riley's actual address) because it would further emphasize Riley's proclaimed fear for his life.

ableness of Riley's fear when confronted with Amabile's demand to authorize the second draw" and the jury was instructed to consider it only for that purpose. 394 F.2d at p. 313.

Finally, Battaglia and Amabile complain that they were convicted for violating the general conspiracy statute (18 U.S.C. § 371), carrying a five year maximum prison term, instead of a conspiracy in violation of the Hobbs Act (18 U.S.C. § 1951), which authorizes the imposition of their fifteen year sentences. They urge that the indictment charges a general conspiracy under 18 U.S.C. § 371 to commit the conspiracy defined under 18 U.S.C. § 1951. An examination of the indictment refutes their claim. Defendants were charged only with conspiring to extort money in violation of the Hobbs Act, which is expressly proscribed thereby.[3] Thus the grand jury charged that defendants and Rocco Pranno "did unlawfully * * * conspire * * * to obstruct, delay and affect commerce, as that term is defined in Title 18, United States Code, Section 1951, and the construction of said multiple dwelling units in Lansing, Illinois, and the movement in interstate commerce of

[3] In pertinent part, the Hobbs Act [18 U.S.C. § 1951] provides:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or *conspires* so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be [punished]. * * * *

"(b) As used in this section—

* * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." (Emphasis supplied.)

materials, supplies, and other commodities required for the construction, sale, rental and management of said multiple dwelling units, and to attempt so to do by extortion, as that term is defined in Title 18, United States Code, Section 1951." The indictment then details parts of the conspiracy and concludes "[a]ll in violation of Title 18, United States Code, Section 1951."

The judgments of conviction are affirmed.

SWYGERT, *Chief Judge*, concurring in part.

I agree that the issues presented in this appeal relating to the alleged use of illegally obtained electronic surveillance do not require reversal. However, I adhere to my dissents in the prior appeals and would reverse the convictions of the defendants for the reasons stated therein.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Chicago, Illinois 60604

Friday, October 2, 1970

Before

Hon. LUTHER M. SWYGERT, Chief Judge

Hon. F. RYAN DUFFY, Senior Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

No. 16314 vs.

JOSEPH AMABILE, *Defendant-Appellant*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.